CLERK'S COPY.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 245.

THOMAS G. BUSH, THOMAS A. GILLISPIE, AND ORION L. HURLBUT, AS TRUSTEES IN BANKRUPTCY OF THE SOUTHERN CAR AND FOUNDRY COMPANY, A BANKRUPT, PLAINTIFFS IN ERROR,

vs.

J. M. ELLIOTT, JR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ALABAMA.

FILED APRIL 27, 1905.

(19,733.)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 5, 1905.

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1 Caption.

UNITED STATES OF AMERICA,
Northern District of Alabama, Eastern Division.

Pleas had at a regular term of the United States circuit court in and for the eastern division of the northern district of Alabama, begun and held in the county court rooms of Calhoun county, at Anniston, in said division and district, on the first Monday of November, it being the seventh day thereof, in the year of our Lord one thousand nine hundred and four, and of the Independence of the United States of America the one hundred and twenty-ninth.

Present: The Hon. Harry T. Toulmin, United States district judge, southern district of Alabama, presiding under order of designation made by Hon. David D. Shelby, United States circuit judge, fifth judicial circuit; Hon. W. H. Standifer, assistant United States attorney, D. N. Cooper, marshal; and Chas. J. Allison, clerk.

THOS. G. BUSH, THOS. A. GILLISPIE, and ORION L. HURLBUT, as Trustees in Bankruptcy of the Southern Car and Foundry Company,

versus

J. M. ELLIOTT, JR.

Be it remembered that heretofore, to-wit: on the 3rd day of December, 1903, came Thos. G. Bush, Thos. A. Gillispie and Orion L. Hurlbut, as trustees in bankruptcy of the Southern Car and Foundry Company, by their solicitors, and filed in the office of the clerk of said circuit court their original bill of complaint against the said J. M. Elliott, Jr., the respondent herein, and said bill of complaint was in words and figures following, to-wit:

2 Summons and Complaint.

UNITED STATES OF AMERICA:

In the Circuit Court of the United States for the Eastern Division of the Northern District of Alabama.

The President of the United States of America to the marshal of said district, Greeting:

You are hereby commanded to summon J. M. Elliott, Jr., who is a citizen of the State of Alabama, to appear before the honorable circuit court aforesaid, at the place of holding said court at Anniston on the first Monday in May next, to answer the complaint of Thomas G. Bush, Thomas A. Gillispie and Orion L. Hurlbut, as trustees in bankruptcy of the Southern Car & Foundry Company, a body corporate under the laws of the State of New Jersey, and a citizen of

said State, a bankrupt, duly adjudicated by the district court of the United States having jurisdiction of said bankrupt, and who were duly appointed such trustees by said court, and have you then and there this writ.

Witness, the Hon. Melville W. Fuller, Chief Justice of [SEAL.] the Supreme Court of the United States, this third day of December, in the year of our Lord one thousand nine hundred and three.

Issued the 3rd day of December, in the year of our Lord one thousand nine hundred and three.

Attest:

CHAS. J. ALLISON,
Clerk U. S. Circuit Court, Northern
District of Alabama.

3 In the Circuit Court of the United States for the Eastern Division of the Northern District of Alabama.

THOMAS G. BUSH, THOMAS A. GILLISPIE, and ORION L. HURLBUT, as Trustees in Bankruptcy of the Southern Car & Foundry Company, a Body Corporate Organized under the Laws of the State of New Jersey and a Citizen of said State, a Bankrupt Duly Adjudicated by the District Court of the United States Having Jurisdiction of said Bankrupt, and Who Were Duly Appointed Such Trustees by said Court, Plaintiffs,

vs.

J. M. ELLIOTT, JR., Who is a Citizen of the State of Alabama, Defendant.

The said plaintiffs, as trustees in bankruptcy of the Southern Car and Foundry Company, a bankrupt as aforesaid, the said Southern Car and Foundry Company being a corporation organized and existing under the laws of New Jersey, and a citizen of said State, claims of the said defendant, a citizen of the State of Alabama, the sum of one hundred and fifty thousand ($150,000.00) dollars, for moneys paid by the said Southern Car and Foundry Company prior to the said adjudication in bankruptcy, to-wit, on the 17th day of January, 1901, at his request, which sum of money, with the interest thereon, is still due and unpaid, and is the property of the said plaintiffs as trustees as aforesaid.

(2.) And the said plaintiffs, as trustees in bankruptcy as aforesaid, claim of the said defendant the further sum of one hundred and fifty thousand ($150,000.00) dollars for money on to-wit, the 17th day of January, 1901, and prior to said adjudication in bankruptcy, received by the said defendant to the use of the said Southern Car and Foundry Company, which sum of money, with the interest thereon, is still due and unpaid, and is the property of the said plaintiffs, as trustees, as aforesaid.

(3.) And the said plaintiffs as trustees in bankruptcy, as aforesaid, claim of the said defendant the further sum of one hundred and

fifty thousand ($150,000.00) dollars, due from him on, to-wit, the 17th day of January, 1901, and prior to the said adjudication in bankruptcy, by account to the said Southern Car and Foundry Company; which sum of money with the interest thereon, is still due and unpaid, and the property of the said plaintiffs as trustees, as aforesaid.

4 (4.) And the said plaintiffs, as trustees, as aforesaid claim of the said defendant the further sum of one hundred and fifty thousand ($150,000) dollars for money loaned by the said Southern Car and Foundry Company to the said defendant on to-wit the 17th day of January, 1901, and prior to said adjudication in bankruptcy, which sum of money, with the interest thereon, is still due and unpaid, and is the property of the said plaintiffs, as trustees, as aforesaid.

(5.) And the said plaintiffs as trustees in bankruptcy, as aforesaid, claim of the said defendant the further sum of one hundred and fifty thousand ($150,000.00) dollars on an account stated between the said Southern Car and Foundry Company, and the said defendant, on to-wit the 17th day of January, 1901, and prior to said adjudication in bankruptcy, which sum of money, with the interest thereon is still due and unpaid, and is the property of the plaintiffs, as trustees as aforesaid.

(6.) And the said plaintiffs, as trustees in bankruptcy, as aforesaid, claim of the said defendant the further sum of one hundred and fifty thousand ($150,000.00) dollars for merchandise, goods and chattels, soldby the said Southern Car and Foundry Company to the defendant on, to-wit the 17th day of January, 1901, and prior to the said adjudication in bankruptcy which sum of money, with the interest thereon, is still due and unpaid, and is the property of the plaintiffs as trustees, as aforesaid.

(7.) And the said plaintiffs, as trustees, as aforesaid, claim of the said defendant the further sum of one hundred and fifty thousand ($150,000.) dollars, for that the said defendant was, on to-wit the 17th day of January, 1901, indebted to the Chase National Bank of New York, a body corporate, in a large sum of money, to-wit: in the sum of one hundred and fifty thousand ($150,000.00) dollars, principal and interest, and while so indebted, as aforesaid, the said defendant was the president of the said Southern Car and Foundry Company, and was exercising the powers of such president, and that while such president, and while exercising the powers of such president, the said Southern Car and Foundry Company, on, to-wit, the 17th day of January, 1901, and prior to the said adjudication in bankruptcy, paid off, and discharged the aforesaid indebtedness of the said defendant to the said Chase National Bank of New York, principal and interest, for and on account of the said defendant, and by and with his consent, and in paying off, and discharging the

5 aforesaid indebtedness of the said defendant, the said Southern Car and Foundry Company then and there paid for the said defendant the said sum of one hundred and fifty thousand

($150,000.00) dollars, which sum of money, with interest thereon, is still due and unpaid, and is the property of the said plaintiffs, as trustees, as aforesaid.

(8.) And the said plaintiffs, as trustees, as aforesaid, claim of the said defendant the further sum of one hundred and fifty thousand ($150,000.) dollars, for that the said defendant, on to-wit, the 17th day of January, 1901, was indebted to the Chase National Bank of New York, a body corporate, in a large sum of money, to wit, in the sum of one hundred and fifty thousand ($150,000.00) dollars, and while he was so indebted, the said defendant was the president of the said Southern Car & Foundry Company, and was engaged at such time in the exercise of the powers of such president, and that while he was president of the said company, and while engaged in the exercise of the powers of such president, the said Southern Car and Foundry Company, by the procurement of the said defendant, paid off and discharged the aforesaid indebtedness so owing by the said defendant as aforesaid, to-wit, on the 17th day of January, 1901, and prior to the said adjudication in bankruptcy, and in so paying off, and discharging the said indebtedness, the said Southern Car and Foundry Company paid for the said defendant, a large sum of money to-wit one hundred and fifty thousand ($150,000.00) dollars which he has never paid back to the said company, but which with the interest thereon, is still due and unpaid, and is the property of the said plaintiffs, as trustees as aforesaid.

(8.) And the said plaintiffs, as trustees, as aforesaid, claim of the said defendant the further sum of one hundred and fifty thousand ($150,000.) dollars, for that the said defendant, on, to-wit, the 17th day of January, 1901, was indebted to the Chase National Bank of New York, a body corporate, in a large sum of money, to wit, in the sum of one hundred and fifty thousand ($150,000.00) dollars, and on said day, and while so indebted, the said defendant was president of the Southern Car and Foundry Company, and in the exercise of the powers of such president, and while so indebted, and while such president, and exercising such powers, he suffered or allowed the said Southern Car and Foundry Company to pay off and discharge the aforesaid indebtedness for him, and the said Southern Car & Foundry Company did, on to-wit, the 17th day of January, 1901, pay off and discharge said indebtedness for the said defendant, and in paying off and discharging the aforesaid indebtedness, the
6 said Southern Car and Foundry Company, on to-wit, the date last aforesaid, and prior to the said adjudication in bankruptcy, paid out for the said defendant a large sum of money, to-wit, the sum of one hundred and fifty thousand ($150,000.00) dollars, which the said defendant has failed and refused to pay to the said Southern Car and Foundry Company, or to the said plaintiffs as trustees, as aforesaid, but the same with interest thereon is still due and unpaid, and is the property of the said plaintiffs, as trustees, as aforesaid.

(9.) And the said plaintiffs, as trustees, as aforesaid, claim of the

said defendant the further sum of one hundred and fifty thousand ($150,000.) dollars, for balance due by him to the said Southern Car and Foundry Company, for and on account of part of the capital stock of the said Southern Car and Foundry Company which he subscribed for, or agreed to take, and which was thereafter issued to him by the said Southern Car and Foundry Company, and which he promised to pay for, but which balance, with the interest thereon, from the date when the same became due and payable, to-wit, the 17th day of May, 1899, has never been paid, and which is still due and unpaid, and the property of the plaintiffs, as trustees, as aforesaid.

And the said plaintiffs aver as a part of each and every one of the foregoing counts that the said Southern Car and Foundry Company is a body corporate organized and existing under the laws of the State of New Jersey, and a citizen of said State, and was duly adjudicated a bankrupt in and by a district court of the United States, having jurisdiction to make such adjudication, and the said plaintiffs were thereafter duly appointed trustees in bankruptcy of the said Southern Car and Foundry Company, and have duly qualified as such; and that the said defendant is a citizen of the State of Alabama.

WALKER, TILLMAN, CAMPBELL & MORROW,
WILLIAMS & LANCASTER, AND
I. H. BEAL, Att'ys for Plaintiffs.

Filed December 3rd, 1903.
CHAS. J. ALLISON, Clerk.

Endorsed: Executed by handing a copy of the within summons and complaint to the wife of J. M. Elliott, Jr., in the city of Gadsden, Alabama, this 3rd day of Dec. 1903. Mr. Elliott is said to be in the State of New York.

D. N. COOPER, U. S. Marshal,
By H. G. ASHLEY, Deputy.

7 Alias Summons and Complaint.

UNITED STATES OF AMERICA:

In the Circuit Court of the United States for the Eastern Division of the Northern District of Alabama.

The President of the United States of America to the marshal of said district, Greeting:

You are hereby as heretofore commanded to summon J. M. Elliott, Jr., who is a citizen of the State of Alabama, to appear before the honorable circuit court aforesaid, at the place of holding said court at Anniston, on the first Monday of May next, to answer the complaint of Thomas G. Bush, Thomas A. Gillispie and Orion L. Hurl-

but as trustees in bankruptcy of the Southern Car and Foundry Company, a body corporate under the laws of the State of New Jersey, and a citizen of said State, a bankrupt duly adjudicated by the district court of the United States having jurisdiction of said bankrupt and who were duly appointed such trustees by said court, and have you then and there this writ.

Witness, the Hon. Melville W. Fuller, Chief Justice of [SEAL.] the Supreme Court of the United States, this 26th day of March, in the year of our Lord one thousand nine hundred sand four.

Issued the 26th day of March, in the year of our Lord one thousand nine hundred and four.

Attest:

CHAS. J. ALLISON,
Clerk U. S. Circuit Court, Northern
District of Alabama.

8 In the Circuit Court of the United States for the Eastern Division of the Northern District of Alabama.

THOMAS G. BUSH, THOMAS A. GILLISPIE, and ORION L. HURLBUT, as Trustees in Bankruptcy of the Southern Car and Foundry Company, a Body Corporate, Organized under the Laws of the State of New Jersey and a Citizen of said State, a Bankrupt Duly Adjudicated by the District Court of the United States Having Jurisdiction of said Bankrupt, and Who Were Duly Appointed Such Trustees by said Court, Plaintiffs,

vs.

J. M. ELLIOTT, JR., Who is a Citizen of the State of Alabama, Defendant.

The said plaintiffs as trustees in bankruptcy of the Southern Car and Foundry Company, a bankrupt, as aforesaid, the said Southern Car and Foundry Company being a corporation organized and existing under the laws of New Jersey, and a citizen of said State, claims of the said defendant, a citizen of the State of Alabama, the sum of one hundred and fifty thousand ($150,000.00) dollars, for moneys paid by the said Southern Car and Foundry Company prior to the said adjudication in bankruptcy, to wit: on the 17th day of January, 1901, at his request, which sum of money, with the interest thereon, is still due and unpaid, and is the property of the said plaintiffs, as trustees, as aforesaid.

(2.) And the said plaintiffs, as trustees in bankruptcy, as aforesaid, claim of the said defendant the further sum of one hundred and fifty thousand ($150,000.00) dollars, for money, to-wit: the 17th day of January, 1901, and prior to said adjudication in bankruptcy, received by the said defendant to the use of the said Southern Car and Foundry Company, which sum of money, with the interest

thereon, is still due and unpaid, and is the property of the said plaintiffs, as trustees, as aforesaid.

(3.) And the said plaintiffs, as trustees in bankruptcy, as aforesaid, claim of the said defendant the further sum of one hundred and fifty thousand ($150,000.00) dollars, due from him on to-wit: the 17th day of January, 1901, and prior to the said adjudication in bankruptcy, by account, to the said Southern Car and Foundry Company, which sum of money, with the interest thereon, is still due and unpaid, and the property of the said plaintiffs, as trustees, as aforesaid.

9 (4.) And the said plaintiffs, as trustees, as aforesaid, claim of the said defendant, the further sum of one hundred and fifty thousand ($150,000.) dollars, for money loaned by the said Southern Car and Foundry Company to the said defendant on to-wit: the 17th day of January, 1901, and prior to the said adjudication in bankruptcy, which sum of money, with the interest thereon, is still due and unpaid, and is the property of the said plaintiffs, as trustees, as aforesaid.

(5.) And the said plaintiffs, as trustees in bankruptcy, as aforesaid, claim of the said defendant the further sum of one hundred and fifty thousand ($150,000.00) dollars, on an account stated between the said Southern Car and Foundry Company and the said defendant on to-wit: the 17th day of January, 1901, and prior to said adjudication in bankruptcy, which sum of money, with the interest thereon, is still due and unpaid, and is the property of the plaintiffs, as trustees, as aforesaid.

(6.) And the said plaintiffs, as trustees in bankruptcy, as aforesaid, claim of the said defendant the further sum of one hundred and fifty thousand ($150,000.00) dollars for merchandise, goods and chattels, sold by the said Southern Car and Foundry Company to the defendant on to-wit: the 17th day of January, 1901, and prior to the said adjudication in bankruptcy, which sum of money, with the interest thereon, is still due and unpaid, and is the property of the plaintiffs, as trustees, as aforesaid.

(7.) And the said plaintiffs, as trustees as aforesaid, claim of the said defendant the further sum of one hundred and fifty thousand ($150,000.00) dollars, for that the said defendant was on to-wit: the 17th day of January, 1901, indebted to the Chase National Bank of New York, a body corporate, in a large sum of money, to-wit: in the sum of one hundred and fifty thousand ($150,000.00) dollars, principal and interest, and while so indebted, as aforesaid, the said defendant was the president of the said Southern Car and Foundry Company, and was exercising the powers of such president, and that while such president, and while exercising the powers of such president, the said Southern Car and Foundry Company, on to-wit: the 17th day of January, 1901, and prior to the said adjudication in bankruptcy, paid off and discharged the aforesaid indebtedness of the said defendant to the said Chase National Bank of New York, principal and interest, for and on account of the said defendant,

and by and with his consent, and in paying off and discharging the aforesaid indebtedness of the said defendant,
10 the said Southern Car and Foundry Company then and there paid for the said defendant the said sum of one hundred and fifty thousand ($150,000.00) dollars, which sum of money, with interest thereon, is still due and unpaid, and is the property of the said plaintiffs, as trustees, as aforesaid.

(8.) And the said plaintiffs, as trustees, as aforesaid, claim of the said defendant the further sum of one hundred and fifty thousand ($150,000.) dollars, for that the said defendant on to-wit: the 17th day of January, 1901, was indebted to the Chase National Bank of New York, a body corporate, in a large sum of money, to-wit: in the sum of one hundred and fifty thousand ($150,000.00) dollars, and while he was so indebted, the said defendant was the president of the said Southern Car and Foundry Company, and was engaged at such time in the exercise of the powers of such president, and that while he was president of the said company, and while engaged in the exercise of the powers of such president, the said Southern Car and Foundry Company, by the procurement of the said defendant, paid off and discharged the aforesaid indebtedness so owing by the said defendant, as aforesaid, to-wit: on the 17th day of January, 1901, and prior to the said adjudication in bankruptcy, and in so paying off and discharging the said indebtedness, the said Southern Car and Foundry Company paid for the said defendant, a large sum of money, to-wit: one hundred and fifty thousand ($150,000.00) dollars, which he has never paid back to the said company, but which with the interest thereon, is still due and unpaid, and is the property of the said plaintiffs, as trustees, as aforesaid.

(8.) And the said plaintiffs, as trustees, as aforesaid, claim of the said defendant the further sum of one hundred and fifty thousand ($150,000.) dollars, for that the said defendant, on to-wit: the 17th day of January, 1901, was indebted to the Chase National Bank of New York, a body corporate, in a large sum of money, to-wit: in the sum of one hundred and fifty thousand ($150,000.00) dollars, and on said day, and while so indebted, the said defendant was president of the Southern Car and Foundry Company, and in the exercise of the powers of such president, and while so indebted, and while such president, and exercising such powers, he suffered or allowed the said Southern Car and Foundry Company to pay off and discharge the aforesaid indebtedness for him, and the said Southern Car and Foundry Company did, on to-wit: the 17th day of January, 1901,
pay off and discharge the said indebtedness for the said de-
11 fendant, and in paying off and discharging the aforesaid indebtedness, the said Southern Car and Foundry Company on to-wit: the date last aforesaid, and prior to the said adjudication in bankruptcy, paid out for the said defendant a large sum of money, to-wit: the sum of one hundred and fifty thousand ($150,000.00) dollars, which the said defendant has failed and refused to pay to the said Southern Car and Foundry Company, or to the said plain-

tiffs, as trustees, as aforesaid, but the same with interest thereon is still due and unpaid, and is the property of the said plaintiffs, as trustees, as aforesaid.

(9.) And the said plaintiffs, as trustees, as aforesaid, claim of the said defendant the further sum of one hundred and fifty thousand ($150,000.) dollars, for balance due by him to the said Southern Car and Foundry Company, for and on account of part of the capital stock of the said Southern Car and Foundry Company, which he subscribed for, or agreed to take, and which was thereafter issued to him by the said Southern Car and Foundry Company, and which he promised to pay for, but which balance, with the interest thereon, from the date when the same became due and payable, to-wit: the 17th day of May, 1899, has never been paid, and which is still due and unpaid, and the property of the plaintiffs, as trustees as aforesaid.

And the said plaintiffs aver as a part of each and every one of the foregoing counts that the said Southern Car and Foundry Company is a body corporate organized and existing under the laws of the State of New Jersey, and a citizen of said State, and was duly adjudicated a bankrupt in and by a district court of the United States, having jurisdiction to make such adjudication, and the said plaintiffs were thereafter duly appointed trustees in bankruptcy of the said Southern Car and Foundry Company, and have duly qualified as such; and that the said defendant is a citizen of the State of Alabama.

WALKER, TILLMAN, CAMPBELL AND MORROW,
WILLIAMS & LANCASTER, AND
I. H. BEAL, Attorneys for Plaintiffs.

Filed in office March 26th, 1904.
CHAS. J. ALLISON, Clerk.

Endorsed: Executed by leaving a copy of the within summons and complaint with J. M. Elliott, Jr., the defendant in the within stated cause this 28th day of March, 1904. D. N. Cooper, U. S. marshal, by H. G. Ashley, deputy.

12 Objections to Jurisdiction.

In the Circuit Court of the United States for the Eastern Division of the Northern District of Alabama.

THOS. G. BUSH, THOS. A. GILLISPIE, and ORION L. HURLBUT, as Trustees in Bankruptcy of the Southern Car and Foundry Company,

vs.

J. M. ELLIOTT, JR.

Now comes J. M. Elliott, Jr., who appears specially for the purpose of objecting to the jurisdiction of the court, and shows to the

court that the plaintiff Thos. G. Bush is and was at the time of the bringing of this suit a citizen of the State of Alabama; that defendant J. M. Elliott, Jr., is and was at the time of the bringing of this suit also a citizen of the State of Alabama, and defendant does not consent to be sued in the circuit court of the United States for the eastern division of the northern district of the State of Alabama.

And defendant says that this court has no jurisdiction of this cause.

Wherefore defendant prays that this suit may be dismissed for want of jurisdiction.

DORTCH, MARTIN & ALLEN,
GOODHUE & BLACKWOOD,
Defendant's Attorneys, Who Appear Especially for the Purpose of Objecting to the Jurisdiction of the Court.

THE STATE OF ALABAMA, }
Etowah County. }

Before me, C. E. Connor, a notary public in and for said State and county, personally appeared J. M. Elliott, Jr., who having been by me duly sworn deposes and says that the facts stated above are true.

J. M. ELLIOTT, JR.

Sworn to and subscribed before me this 28th day of April, 1904.
[SEAL.]
C. E. CONNOR,
Notary Public.

Filed May 2nd, 1904.
CHAS. J. ALLISON, Clerk.

13 In the Circuit Court of the United States for the Eastern Division of the Northern District of Alabama.

Journal Entry, November 16th, 1904, Minute Book "1," page 109.

THOS. G. BUSH ET ALS. }
vs.
J. M. ELLIOTT, JR. }

This cause coming on to be heard upon the motion to dismiss for want of jurisdiction, the said motion being duly argued at length by attorneys for the respective parties, and the court being fully informed in regard to the same, it was upon consideration adjudged by the court that the motion to dismiss for want of jurisdiction was well taken and the same was granted, it being admitted by the counsel for plaintiff that Thos. G. Bush was a citizen and resident of the State of Alabama as set out in the motion.

It was further ordered by the court that the plaintiffs at their option may withdraw all depositions and original papers now on file in the cause.

14 Bill of Exceptions.

In the Circuit Court of the United States for the Eastern Division of the Northern District of Alabama.

Be it remembered, that at the fall term, 1904, of the circuit court of the United States for the eastern division of the northern district of Alabama, begun and held at Anniston, Alabama, on the 14th day of November, 1904, the following proceedings were had in a certain cause wherein Thomas G. Bush, Thomas A. Gillispie and Orion L. Hurlbut, as trustees in bankruptcy of the Southern Car & Foundry Company, a body corporate organized under the laws of the State of New Jersey, and a citizen of said State, a bankrupt duly adjudicated by the district court of the United States having jurisdiction of said bankrupt, and who were duly appointed such trustees by said court, were plaintiffs, and J. M. Elliott, Jr., who is a citizen of the State of Alabama, was defendant.

Thereupon the defendant, J. M. Elliott, Jr., appeared in said court on May 2nd, 1904, and filed his objection to the jurisdiction of said court, and prayed that said suit be dismissed, the said motion and petition being in words and figures as set out in a writing hereto attached, marked Exhibit D, and made a part hereof.

Thereupon, on November 16th, 1904, said court sustained the objection of said defendant, J. M. Elliott, to the jurisdiction of said court, and dismissed said suit out of said court for want of jurisdiction, said judgment entered by said court in said cause being in words and figures as set out in a writing hereto attached, marked Exhibit E, and made a part hereof.

Thereupon, upon the entry of said judgment, the plaintiffs duly and separately excepted to the action of said court in sustaining the objection of defendant to the jurisdiction of said court, and in dismissing said suit out of said court.

And this, the plaintiff's bill of exceptions to the action of said court not otherwise appearing of record, they now tender and pray that the same may be signed and made a part of the record of said cause, which is accordingly done, in term time, this 21st day of November, 1904.

HARRY T. TOULMIN,
Judge of said Court.

15 EXHIBIT "D."

In the Circuit Court of the United States for the Eastern Division of the Northern District of Alabama.

THOS. G. BUSH, THOS. A. GILLISPIE, and ORION L. HURLBUT, as Trustees in Bankruptcy of the Southern Car and Foundry Company,

vs.

J. M. ELLIOTT, JR.

Now comes J. M. Elliott, Jr., who appears especially for the purpose of objecting to the jurisdiction of the court, and shows to the court that the plaintiff, Thos. G. Bush is and was at the time of the bringing of this suit, a citizen of the State of Alabama; that defendant J. M. Elliott, Jr., is and was at the time of the bringing of this suit also a citizen of the State of Alabama, and the defendant does not consent to be sued in the circuit court of the United States for the eastern division of the northern district of the State of Alabama.

And defendant says that this court has no jurisdiction of this cause. Wherefore defendant prays that this suit may be dismissed for want of jurisdiction.

(Signed) DORTCH, MARTIN & ALLEN,
GOODHEU & BLACKWOOD,
Defendant's Attorneys, Who Appear Specially for the Purpose of Objecting to the Jurisdiction of the Court.

STATE OF ALABAMA,
Etowah County.

Before me, C. E. Conner, a notary public in and for said State and county, personally appeared J. M. Elliott, Jr., who having been by me duly sworn deposes and says that the facts stated above are true.

(Signed) J. M. ELLIOTT, JR.

Sworn — and subscribed before me this the 28th day of April, 1904.

C. E. CONNER,
Notary Public.

16 EXHIBIT "E."

THOS. G. BUSH ET ALS.
vs.
J. M. ELLIOTT, JR.

This cause coming on to be heard upon the motion to dismiss for want of jurisdiction, the said motion having been duly argued at length by attorneys for the respective parties, and the court being

fully informed in regard to the same, it was upon consideration adjudged by the court that the motion to dismiss for want of jurisdiction was well taken and the same was granted, it being admitted by the counsel for plaintiff that Thos. G. Bush was a citizen and resident of the State of Alabama as set out in the motion.

It was further ordered by the court that the plaintiffs at their option may withdraw all depositions and original papers now on file in the cause.

Wednesday, November 16th, 1904.

Endorsed: Filed January 13th, 1905. Chas. J. Allison, clerk.

17 Petition for Writ of Error.

In the Circuit Court of the United States for the Eastern Division of the Northern District of Alabama.

THOS. G. BUSH, THOS. A. GILLISPIE, ORION L. HURLBUT, as Trustees in Bankruptcy of the Southern Car & Foundry Co., a Bankrupt, Pl'ffs,

vs.

J. M. ELLIOTT, JR., Def't.

To the honorable the judges of said court:

Thomas G. Bush, Thomas A. Gillispie and Orion L. Hurlbut as trustees in bankruptcy, as aforesaid, plaintiffs in the above entitled cause now come, and respectfully show and state unto your honors that on or about the 6th day of November, 1904, this court entered judgment herein, in favor of the defendant herein, against the plaintiffs solely upon the question of jurisdiction, raised by the said defendant by his motion to dismiss this cause for want of jurisdiction, as will more fully appear from the record; and that in and by said judgment, this court held that it was without jurisdiction to hear and determine said cause, and upon that ground and that ground alone, this court sustained the defendant's said motion, and dismissed said cause, as will also appear from the record.

And these plaintiffs further say that in said judgment and the proceedings had prior thereunto in this cause, certainerrors were committed to the prejudice of these plaintiffs, all of which will more in detail appear from the assignment of errors filed with, and made a part of this petition.

Wherefore, these plaintiffs pray that a writ of error may issue in this behalf, to the Supreme Court of the United States, for the correction of errors so complained of; that the said question of jurisdiction may be duly certified by this court, to the said Supreme Court; that a transcript of the record, proceedings and papers in this cause pertaining to said question of jurisdiction, that is to say, the summons and complaint, the said motion to dismiss for want of jurisdiction, the bill of exceptions filed in said cause by the plain-

tiffs, and the judgment rendered therein duly authenticated, may be sent to the said Supreme Court.

JOHN P. TILLMAN,
JOHN B. KNOX,
Att'ys for said Plaintiffs.

18 In the Circuit Court of the United States for the Eastern Division of the Northern District of Alabama.

THOS. G. BUSH, THOS. A. GILLISPIE, and ORION L. HURLBUT, as Trustees in Bankruptcy of the Southern Car & Foundry Co., Bankrupt, Pl'ffs,

vs.

J. M. ELLIOTT, JR., Def't.

The said plaintiffs in the above entitled cause, in connection with their petition for a writ of error, filed herewith, and herewith presented, and hereto attached, do make and file the following assignments of error, which they aver occurred upon the trial of said cause:

(1.) For that the said circuit court erred in sustaining defendant's motion filed in said cause to dismiss the said cause for want of jurisdiction, and in dismissing said cause.

(2.) For that the said circuit court erred in dismissing said cause upon motion made by defendant for want of jurisdiction.

(3.) For that the said circuit court erred in holding that it was without jurisdiction to hear and determine said cause, and in dismissing said cause out of said court for want of jurisdiction.

(4.) For that the said circuit court erred in the final judgment rendered by it, dismissing said cause.

JOHN P. TILLMAN,
JOHN B. KNOX,
Att'ys for said Plaintiffs.

Endorsed: Filed March 3rd, 1905. Chas. J. Allison, clerk.

19 Decree Allowing Writ of Error.

In the Circuit Court of the United States for the Eastern Division of the Northern District of Alabama.

THOS. G. BUSH, THOS. A. GILLISPIE, and ORION L. HURLBUT, as Trustees in Bankruptcy of the Southern Car & Foundry Company, a Bankrupt, Pl'ff,

vs.

J. M. ELLIOTT, JR., Def't.

This, the 3rd day of March, 1905, came the plaintiffs in the above entitled cause, and filed herein, and presented to the court their

petition, praying for the allowance of a writ of error intended to be urged by them, and praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, as stated in said petition, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had, as may be proper in the premises.

Upon consideration whereof, the court does, on this day, being in term time, and of the term in which said judgment was rendered, allow the writ of error as prayed for, upon the plaintiffs giving bond, according to law, in the sum of five hundred dollars.

And the court hereby certifies to the Supreme Court of the United States, that the judgment of the said circuit court complained of was a judgment dismissing said cause upon the sole ground that the said court was without jurisdiction to hear and determine the same; and that the only question presented to and decided by the said circuit court in said cause was whether said court had jurisdiction to hear and determine said cause; and this question was decided against the plaintiffs, and by reason thereof, the said cause was dismissed out of the said court.

March 3rd, 1905.

HARRY T. TOULMIN, Judge, etc.

Filed March 4th, 1905.
CHAS. J. ALLISON, Clerk.

20 Certificate to the Supreme Court.

In the Circuit Court of the United States for the Eastern Division of the Northern District of Alabama.

THOS. G. BUSH, THOS. A. GILLISPIE, ORION L. HURLBUT, as Trustees in Bankruptcy of the Southern Car & Foundry Company, Bankrupt, Pl'ff-,

vs.

J. M. ELLIOTT, JR., Def't.

A writ of error to the Supreme Court of the United States having been heretofore at this term of the court allowed to the plaintiffs to review the judgment of this court rendered in said cause, at this term, and is said writ of error mentioned, dismissing said cause for want of jurisdiction, but no certificate having been made by this court of the precise question upon which said cause was dismissed; now, upon motion of the said plaintiffs, the court hereby certifies to the Supreme Court of the United States the following as the questions involved in said judgment, and decided against the said plaintiffs, to-wit:—The Southern Car & Foundry Company, the bankrupt, being a corporation organized and existing, now and at the time of the institution of said suit, under the laws of the State of New Jersey, and a citizen of said State, and the citizenship of the said defendant,

and of the plaintiffs, trustees, being then as now, as follows, that of the defendant, and of the said Thomas G. Bush in the State of Alabama, and that of the said Thos. A. Gillispie in the State of New Jersey, and that of the said Orion L. Hurlbut in the State of Tennessee; and the said suit being in assumpsit for the recovery of a debt or demand alleged in the complaint to have been due and owing to the said bankrupt by the said defendant at the date of the bankruptcy; has this court jurisdiction of said cause, under the bankruptcy act as amended, and especially, under section 23, sub-division A, and sub-division B of said act, as the same has been amended.

This question this court has decided in the negative, and, thereupon, dismissed said cause upon the motion of defendant, as shown by the record.

21 Done this 11th day of March, A. D. 1905, in term time, and of the said term of this court at which said judgment was rendered, the same not yet having been adjourned, and not having expired by operation of law.

HARRY T. TOULMIN, Judge.

Filed March 17th, 1905.
CHAS. J. ALLISON, Clerk.

22 UNITED STATES OF AMERICA:

The President of the United States to the honorable judges of the circuit court of the United States for the eastern division of the northern district of the State of Alabama, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said circuit court, before you, or some one of you, between Thomas G. Bush, Thomas A. Gillispie and Orion L. Hurlbut, as trustees in bankruptcy of the Southern Car and Foundry Company, a bankrupt, as plaintiffs, and J. M. Elliott, Jr., as defendant, a manifest error hath happened, to the great damage of the said Thomas G. Bush, Thomas A. Gillispie and Orion L. Hurlbut, as trustees in bankruptcy, as aforesaid, as by their complaint appears. We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, in the District of Columbia, on the 28" day of April next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the

Supreme Court of the United States, the 29th day of March, in the year of our Lord one thousand nine hundred and five.

[Seal Circuit Court U. S., Nor. Dist. Ala.]

CHAS. J. ALLISON,
Clerk of the said Circuit Court.

Allowed by
HARRY T. TOULMIN, Judge.

22½ [Endorsed:] 11. Thomas G. Bush *et als.* as trustees *vs.* J. M. Elliott Jr. Writ of error Filed April 3rd 1905 Chas. J. Allison, clerk.

Served on the defendant by filing a copy of this writ of error in this office, on this 3rd day of April, 1905.

CHAS. J. ALLISON, Clerk.

23 Bond.

Know all men by these presents, that we, Thomas G. Bush, Thomas A. Gillispie, and Orion L. Hurlbut, as trustees in bankruptcy of the Southern Car and Foundry Company, a bankrupt, as principals, and The United States Fidelity & Guaranty Co. of Baltimore, Maryland, as surety, are held and firmly bound unto J. M. Elliorr, Jr., in the full and just sum of five hundred dollars, to be paid to the said J. M. Elliott, Jr., his certain attorneys, executors, administrators, jointly and severally by these presents.

Sealed with our seals, and dated this the 27th day of March, in the year of our Lord one thousand nine hundred and five.

Whereas, lately at a regular term of the circuit court of the United States, for the eastern division of the northern district of Alabama, in a suit pending in said court between Thomas G. Bush, Thomas A. Gillispie and Orion L. Hurlaut, as trustees in bankruptcy of the Southern Car and Foundry Company, a bankrupt, as plaintiffs, and J. M. Elliott, Jr., as defendant, a judgment was rendered against the said plaintiffs, and the said plaintiffs having obtained a writ of error and filed a copy thereof in the clerk's office of said court to reverse the judgment in the aforesaid suit, and a citation directed to the said J. M. Elliott, Jr., citing and admonishing him to be and appear at the Supreme Court of the United States, to be holden at Washington, in the District of Columbia, within thirty days from the date thereof.

Now, the condition of the above obligation is such, that if the said Thomas G. Bush, Thomas A. Gillispie and Orion L. Hurlbut, as trustees in bankruptcy of the Southern Car and Foundry Company, a bankrupt, shall prosecute said writ of error to effect, and answer all damages and costs if they fail to make their plea good, then the

above obligation to be void; otherwise to remain in full force and virtue.

(Signed) THOS. G. BUSH, as Trustee. [SEAL.]
THOS. A. GILLISPIE, as Trustee, [SEAL.]
By T. G. BUSH
ORION L. HURLBUT, as Trustee, [SEAL.]
By T. G. BUSH.
THE UNITED STATES FIDELITY AND GUARANTY COMPANY,
By LOUIS V. CLARK, Agent, and [SEAL.]
By H. M. ARCHIBALD, Agent. [SEAL.]

Approved by
HARRY T. TOULMIN, Judge.

Filed April 3, 1905.
CHAS. J. ALLISON, Clerk.

21 UNITED STATES OF AMERICA:

The President of the United States to J. M. Elliott, Jr., Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at Washington, in the District of Columbia, on the 28th day of April next, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the eastern division of the northern district of Alabama, in a certain cause therein pending, wherein Thomas G. Bush, Thomas A. Gillispie and Orion L. Hurlbut, as trustees in bankruptcy of the Southern Car and Foundry Company, a bankrupt, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States this 29th day of March, in the year of our Lord one thousand nine hundred and five.

[Seal Circuit Court U. S., Nor. Dist. Ala.]

CHAS. J. ALLISON,
Clerk U. S. Courts.

21½ [Endorsed:] 11. 181–1895 Thomas G. Bush *et als.* as trustees *vs.* J. M. Elliott, Jr. Original citation. Northern district Alabama. Received Apr. 3 1905 office of U. S. marshal. Executed the within citation by handing Amos E. Goodhue a copy this 3 day of April 1905 W. A. Greene deputy U. S. marshal. Amos E. Goodhue is one of the attorneys of record W. A. Greene dep. marshal. Returned and filed April 4, 1905. Chas. J. Allison clerk.

25 Certificate.

UNITED STATES OF AMERICA, }
Northern District of Alabama. }

I, Chas. J. Allison, clerk of the circuit court of the United States, in and for the eastern division of the northern district of Alabama, hereby certify that the foregoing pages, numbered from one to twenty-four, is a full, true and correct transcript of the record in a case pending in this court, wherein Thos. G. Bush, *et als.*, are plaintiss, and J. M. Elliott, Jr., is defendant, as fully as the same appears of record and on file in my office.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this the 19th day of April, in the year of our Lord one thousand nine hundred and five.

Seal Circuit Court U. S., Nor. Dist. Ala.

CHAS. J. ALLISON,
Clerk U. S. Circuit Court, Northern District of Alabama.

Endorsed on cover: File No. 19,733. N. Alabama C. C. U. S. Term No. 245. Thomas G. Bush, Thomas A. Gillispie, and Orion L. Hurlbut, as trustees in bankruptcy of the Southern Car and Foundry Company, a bankrupt, plaintiffs in error, *vs.* J. M. Elliott, Jr. Filed April 27th, 1905. File No. 19,733.

CLERK'S COPY

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 246.

THOMAS G. BUSH, THOMAS A. GILLISPIE, AND ORION L. HURLBUT, AS TRUSTEES IN BANKRUPTCY OF THE SOUTHERN CAR AND FOUNDRY COMPANY, A BANKRUPT, PLAINTIFFS IN ERROR,

vs.

ELLIOTT CAR COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ALABAMA.

FILED APRIL 27, 1906.

(19,734.)

(19,734.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 246.

THOMAS G. BUSH, THOMAS A. GILLISPIE, AND ORION L. HURLBUT, AS TRUSTEES IN BANKRUPTCY OF THE SOUTHERN CAR AND FOUNDRY COMPANY, A BANKRUPT, PLAINTIFFS IN ERROR,

vs.

ELLIOTT CAR COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ALABAMA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 5, 1905.

1 Caption.

UNITED STATES OF AMERICA,
Northern District of Alabama, Eastern Division.

Pleas had at a regular term of the United States circuit court in and for the eastern division of the northern district of Alabama, begun and held in the county court rooms of Calhoun county, at Anniston, in said division and district, on the first Monday of November, it being the seventh day thereof, and of the year of our Lord one thousand nine hundred and four, and of the Independence of the United States of America the one hundred and twenty-ninth year.

Present: The Hon. Harry T. Toulmin, United States district judge, southern district of Alabama, presiding under order of designation made by Hon. David D. Shelby, United States circuit judge, fifth judicial circuit; Hon. W. H. Standifer, assistant United States attorney, D. N. Cooper, marshal; and Chas. J. Allison, clerk.

THOS. G. BUSH, THOS. A. GILLISPIE, and ORION L. HURLBUT, as Trustees in Bankruptcy of the Southern Car and Foundry Company,

versus

ELLIOTT CAR COMPANY.

Be it remembered that heretofore, to-wit: on the 19th day of March, 1904, came Thos. G. Bush, Thos. A. Gillispie and Orion L. Hurlbut, as trustees in bankruptcy of the Southern Car and Foundry Company, by their solicitors, and filed in the office of the clerk of said circuit court their original bill of complaint against the said Elliott Car Company, the respondent herein, and said bill of complaint was in words and figures following, to-wit:

2 Summons and Complaint.

UNITED STATES OF AMERICA:

In the Circuit Court of the United States for the Eastern Division of the Northern District of Alabama.

The President of the United States of America to the marshal for the said district, Greeting:

You are hereby commanded to summon Elliott Car Company, a body corporate who is a citizen of the State of Alabama, to appear before the honorable circuit court aforesaid, at the place of holding said court at Anniston, on the first Monday of May next, to answer the complaint of Thomas G. Bush, Thomas A. Gillispie and Orion L. Hurlbut, as trustees in bankruptcy of the Southern Car and

Foundry Company, a body corporate, who is a citizen of the State of New Jersey, and have you then and there this writ.

Witness, the Hon. Melville W. Fuller, Chief Justice of [SEAL.] the Supreme Court of the United States, this 19th day of March, in the year of our Lord one thousand nine hundred and four.

Issued the 19th day of March, in the year of our Lord one thousand nine hundred and four.

Attest:

CHAS. J. ALLISON,
Clerk U. S. Circuit Court, Northern
District of Alabama.

3 In the Circuit Court of the United States for the Eastern Division of the Northern District of Alabama.

THOMAS G. BUSH, THOMAS A. GILLISPIE, and ORION L. HURLBUT, as Trustees in Bankruptcy of the Southern Car and Foundry Company, a Body Corporate Organized under the Laws of the State of New Jersey and a Citizen of said State, a Bankrupt Duly Adjudicated by the District Court of the United States Having Jurisdiction of said Bankrupt, and Who Were Duly Appointed Such Trustees by said Court, Plaintiffs,

vs.

ELLIOTT CAR COMPANY, a Body Corporate Organized under the Laws of the State of Alabama and a Citizen of said State, Defendant.

(1.) The said plaintiffs, as trustees in bankruptcy of the Southern Car and Foundry Company, a corporation organized and existing under the laws of the State of New Jersey, and a citizen of said State, and duly adjudicated a bankrupt as aforesaid, claims of the said defendant, a corporation organized and existing under the laws of the State of Alabama, and a citizen of said last named State the sum of one hundred thousand dollars for moneys paid by the said Southern Car and Foundry Company prior to the said adjudication in bankruptcy, and on to-wit, the first day of December, 1902, at the said defendant's request, which sum of money with the interest thereon, is still due and unpaid, and is the property of the said plaintiffs as trustees, as aforesaid.

(2.) And the said plaintiffs, as trustees in bankruptcy as aforesaid, claim of the said defendant the further sum of one hundred thousand dollars for money, on to-wit, the 1st day of December, 1902, and prior to the said adjudication in bankruptcy, received by the said defendant to the use of the said Southern Car and Foundry Company, which sum of money, with the interest thereon, is still due and unpaid, and is the property of the said plaintiffs as trustees, as aforesaid.

(3.) And the said plaintiffs as trustees in bankruptcy, as aforesaid, claim of the said defendant the further sum of one hundred thou-

sand dollars, due from the said defendant, on, to-wit, the 1st day of December, 1902, and prior to the said adjudication in bankruptcy, by account to the said Southern Car and Foundry Company, which sum of money, with the interest thereon, is still due and unpaid, and is the property of the said plaintiffs as trustees, as aforesaid.

4 (4.) And the said plaintiffs as trustees as aforesaid claim of the said defendant the further sum of one hundred thousand dollars for money loaned by the said Southern Car and Foundry Company to the said defendant on to-wit, the 1st day of December, 1902, and prior to said adjudication in bankruptcy, which sum of money with interest thereon is still due and unpaid, and is the property of the said plaintiffs as trustees as aforesaid.

(5.) And the said plaintiffs as trustees in bankruptcy, as aforesaid, claim of the said defendant the further sum of one hundred thousand dollars on an account stated between the said Southern Car and Foundry Company and the said defendant, on to-wit, the 1st day of December, 1902, and prior to said adjudication in bankruptcy, which sum of money with the interest thereon, is still due and unpaid, and is the property of the said plaintiffs as trustees as aforesaid.

(6.) And the said plaintiffs, as trustees in bankruptcy, as aforesaid, claim of the said defendant the further sum of one hundred thousand dollars for merchandise, goods, and chattels sold by the said Southern Car and Foundry Company to the said defendant, on to-wit, the 1st day of December, 1902, and prior to the said adjudication in bankruptcy, which sum of money, with the interest thereon, is still due and unpaid, and is the property of the said plaintiffs, as trustees, as aforesaid.

(7.) And the said plaintiffs as trustees in bankruptcy as aforesaid, claim of the said defendant the further sum of ten thousand dollars, for that on to-wit, the — day of ——, 1899, the said defendant made and executed a contract with the said Southern Car and Foundry Company wherein and whereby the said defendant transferred and assigned to the said Southern Car and Foundry Company, certain contracts it then had with divers parties, one of which was a contract with the Tennessee Coal, Iron & Railroad Company, a body corporate, for the sale by the said last named company to the said defendants of a large amount of pig iron, to be delivered in the then future, to-wit: thirty thousand tons, at and for the price of to-wit, ten ($10.00) per ton, and the said Tennessee Coal, Iron & Railroad Company, from time to time, at the instance of the said defendant, delivered said pig iron to the said Southern Car and Foundry Company under said contract, charging the said defendant therefor at the price fixed by said contract, and that the said defendant collected from the said Southern Car & Foundry Company for said iron at a largely increased price to-wit, twenty-five dollars per ton,

5 which, at the instance of the president of the said defendant and a large stockholder thereof, who was also then the president of the said Southern Car and Foundry Company, and acting as such, was paid by the said Southern Car & Foundry Company,

which sum of money, together with the interest thereon, is still due and unpaid, and is the property of the said plaintiffs, as trustees, as aforesaid.

And the said plaintiffs aver, as a part of each and every one of the foregoing counts, that the said Southern Car and Foundry Company is a body corporate organized and existing under the laws of the State of New Jersey and a citizen of said State, and was duly adjudicated a bankrupt in and by a district court of the United States, having jurisdiction to make such adjudication, and the said plaintiffs were thereafter duly appointed trustees in bankruptcy, and have duly qualified as such, and that the said defendant is a body corporate organized and existing under the laws of the State of Alabama, and a citizen of said last named State.

WALKER, TILLMAN, CAMPBELL & MORROW,
GEORGE D. LANCASTER,
Attorneys for Plaintiffs.

Filed March 19th, 1904.

CHAS. J. ALLISON, Clerk.

Marshal's Return.

Executed by handing a copy of the within writ to J. M. Elliott, Jr., as president of the Elliott Car Company, in the city of Gadsden, Ala., this 21st day of March, 1904.

D. N. COOPER, U. S. Marshal,
By H. G. ASHLEY, Dep. Marshal.

6 Objections to Jurisdiction.

In the Circuit Court of the United States for the Eastern Division of the Northern District of Alabama.

THOS. G. BUSH, THOS. A. GILLISPIE, and ORION L. HURLBUT, as Trustees in Bankruptcy of the Southern Car and Foundry Company,

vs.

ELLIOTT CAR COMPANY.

Now comes the Elliott Car Company, who appears specially for the purpose of objecting to the jurisdiction of the court, and shows to the court that the plaintiff Thos. G. Bush is and was at the time of the bringing of this suit a citizen of the State of Alabama; that defendant, The Elliott Car Company, is and was at the time of the bringing of this suit a citizen of the State of Alabama, and defendant does not consent to be sued in the circuit court of the United States for the eastern division of the northern district of Alabama. And defendant says that this court has no jurisdiction of this cause.

Wherefore defendant prays that this suit may be dismissed for want of jurisdiction.

DORTCH, MARTIN & ALLEN,
GOODHUE AND BLACKWOOD,
Defendant's Attorneys, Who Appear Specially for the Purpose of Objecting to the Jurisdiction of the Court.

THE STATE OF ALABAMA, }
Etowah County. }

Before me, C. E. Connor, a notary public in and for said State and county, personally appeared J. M. Elliott, Jr., who being by me duly sworn, deposes and says that the facts stated above are true.

J. M. ELLIOTT, JR.

Sworn to and subscribed before me this 28th day of April, 1904.

C. E. CONNER,
Notary Public.

Filed May 2nd, 1904.

CHAS. J. ALLISON, Clerk.

7 In the Circuit Court of the United States for the Eastern Division of the Northern District of Alabama.

Journal Entry, November 16th, 1904, Minute Book "1," page 109.

THOS. G. BUSH ET AL. }
vs.
ELLIOTT CAR COMPANY. }

This cause coming on to be heard upon the motion to dismiss for want of jurisdiction, the said motion being duly argued at length by attorneys for the respective parties, and the court being fully informed in regard to the same, it was upon consideration adjudged by the court that the motion to dismiss for want of jurisdiction was well taken, and the same was granted it being submitted by the counsel for plaintiff that Thomas G. Bush was a citizen and resident of the State of Alabama as set out in the motion.

8 Bill of Exceptions.

In the Circuit Court of the United States for the Eastern Division of the Northern District of Alabama.

Be it remembered, that at the fall term, 1904, of the circuit court of the United States for the eastern division of the northern district of Alabama, begun and held at Anniston, Alabama, on the 14th day of November, 1904, the following proceedings were had in a certain cause wherein Thomas G. Bush, Thomas A. Gillispie and Orion L.

Hurlbut, as trustees of the Southern Car & Foundry Company, a body corporate, organized under the laws of the State of New Jersey, and a citizen of said State, a bankrupt duly adjudicated by the district court of the United States having jurisdiction of said bankrupt, and who were duly appointed as such trustees in bankruptcy by said court, were plaintiffs, and the Elliott Car Company, a body corporate, organized under the laws of the State of Alabama, and a citizen of said State, was defendant.

Thereupon, the defendant, The Elliott Car Company, appeared in said court on May 2nd, 1904, and filed his objection to the jurisdiction of said court, and prayed that said suit be dismissed, the said motion and petition being marked in words and figures as set out in a writing hereto attached, marked Exhibit E, and made a part hereof.

Thereupon, on November 16th, 1904, said court sustained the objection of said defendant, Elliott Car Company, to the jurisdiction of said court, and dismissed said suit out of said court for want of jurisdiction, said judgment entered in said cause by said court being in words and figures as set out in a writing hereto attached, marked Exhibit E, and made a part hereof.

Thereupon, upon the entry of said judgment, the plaintiffs duly and separately excepted to the action of said court in sustaining the objection of defendant to the jurisdiction of said court, and in dismissing said suit out of said court.

And this the plaintiff's bill of exceptions to the action of said court not otherwise appearing of record, they now tender, and pray that the same may be signed and made a part of the record of said cause, which is accordingly done, in term time, this 21st day of November, 1904.

HARRY T. TOULMIN, Judge.

9 EXHIBIT "D."

In the Circuit Court of the United States for the Eastern Division of the Northern District of Alabama.

THOS. G. BUSH, THOS. A. GILLISPIE, and ORION L. HURLBUT, as Trustees in Bankruptcy of the Southern Car and Foundry Company,

vs.

ELLIOTT CAR COMPANY.

Now comes the Elliott Car Company, which appears specially for the purpose of objecting to the jurisdiction of the court, and shows to the court that the plaintiff, Thos. G. Bush is and was at the time of the bringing of this suit, a citizen of the State of Alabama; that defendant, The Elliott Car Company, is and was at the time of the bringing of this suit, a citizen of the State of Alabama, and defendant does not consent to be sued in the circuit court of the United

States for the eastern division of the northern district of Alabama. And defendant says that this court has no jurisdiction of this cause.

Wherefore defendant prays that this suit may be dismissed for want of jurisdiction.

(Signed) DORTCH, MARTIN & ALLEN,
GOODHUE & BLACKWOOD,
Defendant's Attorneys, Who Appear Specially for the Purpose of Objecting to the Jurisdiction of the Court.

STATE OF ALABAMA, }
Etowah County. }

Before me, C. E. Conner, a notary public in and for said State and county, personally appeared J. M. Elliott, Jr., who being by me duly sworn deposes and says that the facts stated above are true.

(Signed) JIM ELLIOTT, JR.

Sworn to and subscribed before me on this the 28th day of April, 1904.

C. E. CONNER,
Notary Public.

10 EXHIBIT "E."

THOS. G. BUSH ET ALS. }
vs. }
ELLIOTT CAR COMPANY. }

This cause coming on to be heard upon the motion to dismiss for want of jurisdiction, the said motion being duly argued at length by attorneys for the respective parties, and the court being fully informed in regard to the same, it was upon consideration adjudged by the court that the motion to dismiss for want of jurisdiction was well taken and the same was granted it being admitted by the counsel for plaintiff that Thos. G. Bush was a citizen and resident of the State of Alabama as set out in the motion.

Wednesday, November 16th, 1904.

Filed January 13th, 1905.
CHAS. J. ALLISON, Clerk.

11 Petition for Writ of Error.

In the Circuit Court of the United States for the Eastern Division of the Northern District of Alabama.

THOS. G. BUSH, THOS. A. GILLISPIE, and ORION L. HURLBUT, as Trustees in Bankruptcy of the Southern Car and Foundry Company,

vs.

ELLIOTT CAR COMPANY.

To the honorable the judges of said court:

Thomas G. Bush, Thomas A. Gillispie and Orion L. Hurlbut as trustees in bankruptcy, as aforesaid, plaintiffs in the above entitled cause now come, and respectfully show and state unto your honors that on or about the 6th day of November, 1904, this court entered judgment herein, in favor of the defendant herein, against the plaintiffs solely upon the question of jurisdiction, raised by the said defendant by his motion to dismiss this cause for want of jurisdiction, as will more fully appear from the record; and that in and by said judgment, this court held that it was without jurisdiction to hear and determine said cause, and upon that ground and that ground alone, this court sustained the defendant's said motion, and dismissed said cause, as will also appear from the record.

And said plaintiffs further say that in said judgment and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of these plaintiffs, all of which will more in detail appear from the assignment of errors filed with, and made a part of this petition. Wherefore these plaintiffs pray that a writ of error may issue in this behalf, to the Supreme Court of the United States, for the correction of errors so complained of; that the said question of jurisdiction may be duly certified by this court, to the said Supreme Court; and that a transcript of the record, proceedings and papers in this cause pertaining to said question of jurisdiction, that is to say, the summons and complaint, the said motion to dismiss for want of jurisdiction, the bill of exceptions filed in said cause by the plaintiffs, and the judgment rendered therein duly authenticated, may be sent to the said Supreme Court.

JNO. P. TILLMAN,
JNO. B. KNOX,
Att'ys for Plaintiffs.

Filed March 3rd, 1905,
CHAS. J. ALLISON, Clerk.

12 Assignment of Errors.

In the Circuit Court of the United States for the Eastern Division of the Northern District of Alabama.

THOS. G. BUSH, THOS. A. GILLISPIE, and ORION L. HURLBUT, as Trustees in Bankruptcy of the Southern Car and Foundry Company,

vs.

ELLIOTT CAR COMPANY.

The said plaintiffs in the above entitled cause, in connection with their petition for a writ of error, filed herewith, and herewith presented and hereto attached, do make and file the following assignments of error, which they aver occurred upon the trial of said cause:

(1.) For that the said circuit court erred in sustaining defendant's motion filed in said cause to dismiss the said cause for want of jurisdiction, and in dismissing said cause.

(2.) For that the said circuit court erred in dismissing said cause upon motion made by defendant for want of jurisdiction.

(3.) For that the said circuit court erred in holding that it was without jurisdiction to hear and determine said cause, and in dismissing said cause out of said court for want of jurisdiction.

(4.) For that the said circuit court erred in the final judgment rendered by it, dismissing said cause.

JNO. P. TILLMAN,
JNO. B. KNOX,
Attorneys for said Plaintiffs.

Filed March 3rd, 1905.
CHAS. J. ALLISON, Clerk.

13 Decree Allowing Writ of Error.

In the Circuit Court of the United States for the Eastern Division of the Northern District of Alabama.

THOS. G. BUSH, THOS. A. GILLISPIE, and ORION L. HURLBUT, as Trustees in Bankruptcy of the Southern Car and Foundry Company,

vs.

ELLIOTT CAR COMPANY.

This, the 3rd day of March, 1905, came the plaintiffs in the above entitled cause, and filed herein, and presented to the court their petition, praying for the allowance of a writ of error intended to be urged by them, and praying also that a transcript of the record and

proceedings and papers upon which the judgment herein was required, as stated in said petition, duly authenticated, may be sent to the Supreme Court of the United States; and that such other and further proceedings may be had, as may be proper in the premises.

Upon consideration whereof, the court does, on this day, being in term time, and of the term in which said judgment was rendered, allow the writ of error as prayed for, upon the plaintiffs giving bond, according to law, in the sum of five hundred dollars.

And the court hereby certifies to the Supreme Court of the United States, that the judgment of the said circuit court complained of was a judgment dismissing said cause upon the sole ground that the said court was without jurisdiction to hear and determine the same; and that the only question presented to and decided by the said circuit court in said cause was whether said court had jurisdiction to hear and determine said cause; and this question was decided against the plaintiffs, and by reason thereof, the said cause was dismissed out of said court.

March 3rd, 1905.

HARRY T. TOULMIN, Judge.

Filed March 4th, 1905.
CHAS. J. ALLISON, Clerk.

14 Certificate to Supreme Court of the United States.

In the Circuit Court of the United States for the Eastern Division of the Northern District of Alabama.

THOS. G. BUSH, THOS. A. GILLISPIE, and ORION L. HURLBUT, as Trustees in Bankruptcy of the Southern Car and Foundry Company,

vs.

ELLIOTT CAR COMPANY.

A writ of error to the Supreme Court of the United States having been heretofore at this term of the court allowed to the plaintiffs to review the judgment of this court rendered in said cause at this term, and in said writ of error mentioned, dismissing said cause for want of jurisdiction, but no certificate having been made by this court of the precise question upon which said cause was dismissed; now upon motion of the said plaintiffs, the court hereby certifies to the Supreme Court of the United States the following as the question involved in said judgment, and decided against the plaintiffs, to-wit: The Southern Car & Foundry Company, the bankrupt, being a corporation organized and existing now and at the time of the institution of said suit, under the laws of the State of New Jersey, and a citizen of said State, and the said defendant being now and then a corporation organized and existing under the laws of the State of Alabama, and a citizen of said last named State, and the said Thomas G. Bush, one of the plaintiffs, being then and now a

citizen of the State of Alabama, and the said Thomas A. Gillispie and the said Orion L. Hurlbut, the other plaintiffs, being then and now citizens, one of the State of New Jersey, and the other of the State of Tennessee, and the said suit being in assumpsit for the recovery of a debt or demand, alleged in the complaint to have been due and owing to the said bankrupt, by the said defendant, and at the date of the bankruptcy, has this court jurisdiction of said cause under the bankruptcy act, as amended, and especially, under section 23, sub-division "A," and sub-division "B" of said act as amended.

This question, this court decided in the negative, and thereupon dismissed said cause upon the motion of defendant, as shown by the record.

15 Done, this, the 11th day of March, A. D. 1905, in term time, and of the said term of this court at which said judgment was rendered, the same not yet having been adjourned, and not having expired by operation of law.

HARRY T. TOULMIN, Judge.

Filed Mar. 17th, 1905.
CHAS. J. ALLISON, Clerk.

16 UNITED STATES OF AMERICA:

The President of the United States to the honorable judges of the circuit court of the United States for the eastern division of the northern district of the State of Alabama, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some one of you, between Thomas G. Bush, Thomas A. Gillispie and Orion L. Hurlbut, as trustees in bankruptcy of the Southern Car and Foundry Company, a bankrupt, as plaintiffs, and The Elliott Car Company, a corporation, as defendant, a manifest error hath happened, to the great damage of the said Thomas G. Bush, Thomas A. Gillispie and Orion L. Hurlbut, as trustees in bankruptcy, as aforesaid, as by their complaint appears. We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, in the District of Columbia, on the 28" day of April next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the

Supreme Court of the United States, the 29th day of March, in the year of our Lord one thousand nine hundred and five.

[Seal Circuit Court U. S., Nor. Dist. Ala.]

CHAS. J. ALLISON,
Clerk of the said Circuit Court.

Allowed by
HARRY T. TOULMIN, Judge.

16½ [Endorsed:] 13. Thomas G. Bush *et als.* as trustees *vs.* Elliott Car Company Writ of error Filed April 3rd 1905 Chas. J. Allison, clerk.

Served on the defendant by filing a copy of this writ of error, in this office, on this 3rd day of April, 1905.

CHAS. J. ALLISON, Clerk.

17 Bond.

Know all men by these presents, that we, Thomas G. Bush, Thomas A. Gillispie and Orion L. Hurlbut, as trustees in bankruptcy of the Southern Car and Foundry Company, a bankrupt, as principals, and The United States Fidelity and Guaranty Co. of Baltimore, Maryland, as surety, are held and firmly bound unto the Elliott Car Company, a corporation, in the full and just sum of five hundred dollars, to be paid to the said Elliott Car Company, its attorneys, successors or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals, and dated this the 27th day of March, in the year of our Lord one thousand nine hundred and five.

Whereas, lately at a regular term of the circuit court of the United States, for the eastern division of the northern district of Alabama, in a suit pending in said court between Thomas G. Bush, Thomas A. Gillispie and Orion L. Hurlbut, as trustees in bankruptcy of the Southern Car and Foundry Company, a bankrupt, as plaintiffs, and the Elliott Car Company, a corporation, as defendant, a judgment was rendered against the said plaintiffs, and the said plaintiffs having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Elliott Car Company, citing and admonishing it to be and appear before the Supreme Court of the United States, to be holden at Washington, in the District of Columbia, within thirty days from the date thereof.

Now the condition of the above obligation is such, that if the said Thomas G. Bush, Thomas A. Gillispie and Orion L. Hurlbut, as trustees in bankruptcy of the Southern Car & Foundry Company, a bankrupt, shall prosecute said writ of error to effect, and answer all

damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

T. G. BUSH, as Trustee. [SEAL.]
THOS. A. GILLISPIE, as Trustee, [SEAL.]
By T. G. BUSH.
ORION L. HURLBUT, as Trustee, [SEAL.]
By T. G. BUSH.
THE UNITED STATES FIDELITY & GUARANTY CO., [SEAL.]
By LOUIS V. CLARK, Agent, and
By H. M. ARCHIBALD, Agent.

Approved by
HARRY T. TOULMIN, Judge.

Filed April 3rd, 1905.
CHAS. J. ALLISON, Clerk.

18 UNITED STATES OF AMERICA:

The President of the United States to Elliott Car Company, a corporation, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at Washington in the District of Columbia, on the 28th day of April next, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the eastern division of the northern district of Alabama, in a certain cause therein pending, wherein Thomas G. Bush, Thomas A. Gillispie and Orion L. Hurlbut, as trustees in bankruptcy of the Southern Car and Foundry Company, a bankrupt, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States this 29 day of March, in the year of our Lord one thousand nine hundred and five.

[Seal Circuit Court U. S., Nor. Dist. Ala.]

CHAS. J. ALLISON,
Clerk U. S. Courts.

19 [Endorsed:] 13. 50 241-2197 Thomas G. Bush *et als.* as trustees *v.* Elliott Car Company Original citation. Northern district Alabama. Received Apr. 3 1905 office of U. S. marshal. Executed the within citation by handing Amos E. Goodhue a copy this 3 day of Apr. 1905 W. A. Greene deputy U. S. marshal. Amos E. Goodhue is one of the attorneys of record W. A. Greene dep. marshal. Returned and filed Apr. 4, 1905. Chas. J. Allison clerk.

20 Certificate.

UNITED STATES OF AMERICA,
Northern District of Alabama.

I, Chas. J. Allison, clerk of the circuit court of the United States, in and for the eastern division of the northern district of Alabama, hereby certify that the foregoing pages, numbered from one to eighteen, is a full, true and correct transcript of the record in a case pending in this court, wherein Thos. G. Bush *et al.* are plaintiffs, and the Elliott Car Company is defendant, as fully as the same appears of record and on file in my office.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this the 19th day of April, in the year of our Lord one thousand nine hundred and five.

Seal Circuit Court U. S., Nor. Dist. Ala.

CHAS. J. ALLISON,
Clerk U. S. Circuit Court, Northern District of Alabama.

Endorsed on cover: File No. 19,734. N. Alabama C. C. U. S. Term No. 246. Thomas G. Bush, Thomas A. Gillispie, and Orion L. Hurlbut, as trustees in bankruptcy of the Southern Car & Foundry Company, a bankrupt, plaintiffs in error, *vs.* Elliott Car Company. Filed April 27th, 1905. File No. 19,734.

FILE COPY.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

Office Supreme Court U. S.
FILED
MAR 5 1906
JAMES H. McKENNEY,
Clerk.

No. 245.

THOMAS G. BUSH ET AL., AS TRUSTEES, &C.,
PLAINTIFFS IN ERROR,

versus

J. M. ELLIOTT, JR.

No. 246.

THOMAS G. BUSH ET AL., AS TRUSTEES, &C.,
PLAINTIFFS IN ERROR,

versus

ELLIOTT CAR COMPANY.

BRIEF FOR THE PLAINTIFFS IN ERROR.

JOHN P. TILLMAN,
GEORGE D. LANCASTER,
JAMES H. BEAL,
Counsel for Plaintiffs in Error.

(19,733 and 19,734.)

IN THE

Supreme Court of the United States.

October Term, 1905.

No. 245.

THOMAS G. BUSH, THOMAS A. GILLESPIE and ORION L. HURLBUT, as Trustees in Bankruptcy of the SOUTHERN CAR & FOUNDRY COMPANY, a Bankrupt,
Plaintiffs in Error,

versus

J. M. ELLIOTT, JR.

No. 246.

THOMAS G. BUSH, THOMAS A. GILLESPIE and ORION L. HURLBUT, as Trustees in Bankruptcy of the SOUTHERN CAR & FOUNDRY COMPANY, a Bankrupt,
Plaintiffs in Error,

versus

ELLIOTT CAR COMPANY.

In Error to the Circuit Court of the United States for the Northern District of Alabama.

Statement of the Cases.

These cases are brought to this court from the United States Circuit Court for the Eastern Division of the Northern District of Alabama by Writs of Error, and the question

involved is, whether under Section 23 of the Bankruptcy Act of 1898, as amended by the Act of 1903, that court erred in dismissing the cases for want of jurisdiction.

The actions are brought by Thomas G. Bush, Thomas A. Gillespie and Orion L. Hurlbut, as Trustees in Bankruptcy of the Southern Car & Foundry Company, the one against J. M. Elliott, Jr., and the other against the Elliott Car Company, a corporation of Alabama.

The complaints in each case are printed in the record; they are in assumpsit, and seek to recover money owing by the defendants to the bankrupt at and prior to the adjudication of bankruptcy.

The defendant in each case moved the court to dismiss the case for want of jurisdiction, upon the ground that Thomas G. Bush, one of the plaintiffs, was a citizen and resident of the State of Alabama.

The certificate of the Trial Judge (page 15 of the Record at No. 245, and page 10 of the Record at No. 246) shows that the Southern Car & Foundry Company, the bankrupt, is a corporation and citizen of the State of New Jersey; that Thomas G. Bush, was and is a citizen of the State of Alabama. Thomas A. Gillespie, a citizen of the State of New Jersey, and Orion L. Hurlbut, a citizen of the State of Tennessee, the three individuals named being the Trustees in Bankruptcy of said Southern Car & Foundry Company. That the Elliott Car Company is a corporation and citizen of the State of Alabama, and J. M. Elliott, Jr., is a citizen of the State of Alabama.

The question is, whether, upon these facts, the Circuit Court should have entertained jurisdiction of the cases under Section 23 of the Bankruptcy Act of 1898.

Specification of Errors at No. 245.

(1) For that the said Circuit Court erred in sustaining defendant's motion filed in said cause to dismiss the said cause for want of jurisdiction, and in dismissing said cause.

(2) For that the said Circuit Court erred in dismissing said cause upon motion made by defendant for want of jurisdiction.

(3) For that the said Circuit Court erred in holding that it was without jurisdiction to hear and determine said cause, and in dismissing said cause out of said court for want of jurisdiction.

(4) For that the said Circuit Court erred in the final judgment rendered by it, dismissing said cause.

Specification of Errors at No. 246.

(1) For that the said Circuit Court erred in sustaining defendant's motion filed in said cause to dismiss the said cause for want of jurisdiction, and in dismissing said cause.

(2) For that the said Circuit Court erred in dismissing said cause upon motion made by defendant for want of jurisdiction.

(3) For that the said Circuit Court erred in holding that it was without jurisdiction to hear and determine said cause, and in dismissing said cause out of said court for want of jurisdiction.

(4) For that the said Circuit Court erred in the final judgment rendered by it, dismissing said cause.

Brief of Argument.

The only question involved here is as to the jurisdiction of the Circuit Court to hear and determine these cases, and that question arises under Section 23 of the Bankruptcy Act of 1898.

The facts, so far as they are material to this question, are not in dispute; they appear from the motion to dismiss, the order of the court thereon and the Judge's certificate, all of which appear in the printed record, and may be summarized as follows:

(1) The Southern Car & Foundry Company, the bankrupt, was and is a corporation of the State of New Jersey.

(2) It was duly adjudicated a bankrupt, and Thomas G. Bush, a citizen of Alabama, T. A. Gillespie, a citizen of New Jersey, and Orion L. Hurlbut, a citizen of Tennessee, were appointed Trustees of said bankrupt.

(3) The Elliott Car Company and J. M. Elliott, Jr., the defendants, are and were each of them citizens of the State of Alabama.

(4) The suits were brought in the Circuit Court of the United States for the Eastern Division of the Northern District of Alabama, in which the defendants respectively reside, to recover a large amount of money (in each case more than two thousand dollars, exclusive of interest and costs) owing by the defendants to the bankrupt, at and prior to the adjudication of bankruptcy.

The position of the defendants in the Court below was that the Circuit Court did not have jurisdiction.

(1) Because the word "property" in Section 23a did not include a suit to recover a *money* claim or demand; and

(2) That the Section did not *confer* jurisdiction, but merely *regulated* the jurisdiction existing by virtue of the Judiciary Act; and that as Bush, one of the Trustee plaintiffs, was a citizen of Alabama, of which State the defendants were each citizens, the suits were not maintainable.

Section 23 of the Bankruptcy Act of 1898, as amended by the Act of 1903, under which we contend the Circuit Court has jurisdiction, is as follows:

"JURISDICTION OF UNITED STATES *and State Courts.*

a. The United States Circuit courts shall have jurisdiction of *all controversies at law and in equity*, as distinguished from proceedings in bankruptcy, between trustees *as such* and adverse claimants *concerning* the *property* acquired *or claimed* by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

b. *Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, except suits for the recovery of property under section sixty, sub-division b, and section sixty-seven, sub-division e.*

c. The United States circuit courts shall have concurrent jurisdiction with the courts of bankruptcy, within their respective territorial limits, of the offenses enumerated in this Act."

In each case the defendant presented a motion to dismiss for want of jurisdiction, because Bush, one of the Trustee plaintiffs, was a citizen of Alabama, of which State the defendants were citizens, and this motion was sustained.

FIRST. *A suit by a Trustee in Bankruptcy to recover a money debt or demand owing to the bankrupt, is embraced within the words "all controversies at law or in equity - - - between trustees as such and adverse claimants concerning the property acquired or claimed by the Trustee," as used in Section 23a of the Bankruptcy Act.*

The suit is brought by the Trustees to recover money—the highest type of property—owing by the defendants to the bankrupt at the time of bankruptcy.

The language used in the Bankruptcy Act of 1841, and in the Act of 1867 (prior to the amendment of 1874) was substantially the same as that found in the Act of 1898.

In the case of *Mitchell v. Great Works Milling Company*, 2 Story, 648, Fed Cas. 9,662, which was a bill in equity in the Circuit Court brought by the assignee in bankruptcy for a settlement of an agent's account, Judge Story sustained the jurisdiction, saying:

> "That section (the eighth section of the Bankruptcy Act of 1841) declares: 'That the Circuit Court within and for the District where the decree of bankruptcy is passed, shall have concurrent jurisdiction with the District Court of the same District of all suits at law and in equity, which may and shall be brought by any assignee of the bankrupt against any person or persons claiming an adverse interest, or by such persons against such assignee, touching any property ro rights of *property* of said bankrupt, transferable to or vested in such assignee.' Now, there cannot be a doubt, that a debt claimed by and due to the bankrupt from any person is 'a right of property' in the bankrupt. Every chose in action is a right of property, assignable in equity, if not at law (see *Gray v. Bennett*, 3 Metc. (Mass.) 522,531); and it is clearly assignable under the Bankrupt Act; for that Act declares (Section 3) that upon the decree in bankruptcy, 'all the property and rights of property of every name and nature, real, personal or

mixed, of every bankrupt, &c., shall be deemed vested by force of the same decree in the assignee,' &c; and the assignee, is by the same section vested with full power and authority to sue for the same, as fully to all intents and purposes as the bankrupt himself might at the time of his bankruptcy. The debtor in every such case is necessarily in the sense of the Act an adverse party; if he were not, he would pay the debt or claim; and by his every resistance of it, upon suit brought, shows him to be, in form as well as in fact, an adverse party."

This decision was followed by Judge Curtis in *Pritchard v. Chandler*, 2 Curtis, 488, (Fed. Cas. 11,436) in which he says:

"I concur in the opinion of Mr. Justice Story in *Mitchell v. Great Works Milling & Manufacturing Company*, that a suit by an assignee to recover a debt due to the bankrupt, is a suit against a person claiming an adverse interest touching a right of property of the bankrupt, within the meaning of that section of the Act, and that such a suit is therefore within the jurisdiction of this Court."

In *Ward v. Jenkins*, 10 Met. 583, speaking of the Bankruptcy Act of 1841, Judge Dewey says:

"The bankrupt law, Section 3, vests all the property in the assignee, and confers upon him full power to sue—as full as the bankrupt had; and a debt due to the bankrupt from any person is such right of property, and does thereby vest in the assignee, as was held in Mitchell v. Great Works Milling & Mfg. Co., 2 Story R., 648."

In *Payson v. Coffin*, Fed Cas. 10,858, it is said:

"It was also held by Mr. Justice Miller (the Circuit Judge concurring) on a demurrer to the petition in another case, that assignees in bankruptcy, under the bankrupt act as amended June 22, 1874, *if not before*,

may sue in the Circuit Courts of the United States to collect assets and debts due the estate, without reference to the amount claimed."

Smith v. Knox, 83 U. S. 551, decided in 1871, indicates a similar view.

The reasons for holding this construction of the word "property" in the Act of 1898, is emphasized when we remember that the present law is a carefully drawn statute in which every effort has been made to use the words in their most comprehensive sense, and thereby to compress the act within the smallest limits.

The word "property," in its etymological, as well as in its legal acceptation, includes a money demand. It is not only *property*, but the very substance and essence of all *property*. It fixes the standard by which the value of all other kinds of *property* is determined.

In 23 American & English Enclyclopedia of Law, (2nd Edition) 260, the word *property* is thus defined:

> "Standing alone the word includes everything that is the subject of ownership."

The closest case that we have been able to find is *Pirie v. Chicago Title & Trust Co.*, 182, U. S. 438, where this Court held that *payments in money* were *transfers of property* within the meaning of Section 60a relating to preferences created by transfers of property. After referring to the fact that payments in money were not specially mentioned, the language being "transfers of property," Mr. Justice McKenna says:

> "We are not unaware that a distinction between money and other property is sometimes made, but it would be anomalous in the extreme that in a statute which is concerned with the obligations of debtors and the prevention of preferences to creditors the readiest and most potent instrumentality to give a preference

should have been omitted. *Money is certainly* property, whether we regard any of its forms or any of its theories. It may be composed of precious metal, and hence valuable of itself, gaining little or no addition of value from the attributes which give it its ready exchangeability and currency."

In *Jacquith v. Rowley*, 188 U. S., 620, it is held that a surety in whose hands money was deposited to indemnify him for his liability upon a bail bond is an *adverse claimant* within the meaning of Section 23, and must be proceeded against by plenary suit.

Section 47a provides that

> "Trustees shall respectively (1) account for and pay over to the estates under their control all *interest* received by them upon *property* of such estates; (2) collect and reduce to money the *property* of the estates for which they are trustees, etc."

It would be singular if the use of the word "property" in the first clause did not require the trustee to pay *interest* received by him upon *money* of the estate; and equally singular if the word "property" in the second clause did not authorize the trustee to collect the debts due to the bankrupt, but only physical property, such as horses and lands.

It seems to us therefore that the word "property," as used here, must be given its fair and proper meaning, and that it necessarily includes a suit to recover a money demand.

SECOND. *Section 23a of the Bankruptcy Act confers jurisdiction of these cases upon the Circuit Court.*

The amount involved in each case exceeds two thousand dollars, exclusive of interests and costs. The bankrupt was and is a citizen of the State of New Jersey, while the defendant in each case was and is a citizen of the State of Alabama and resident in the District and Division in which the suits were brought. The question then is, whether the diversity of citizenship required to give jurisdiction under this section of the Bankruptcy Act, is diversity as between the adverse claimant and the *bankrupt*, or as between the adverse claimant and the *Trustees* of the bankrupt.

This question would seem to be explicitly answered by the language of the Act, that

> "The United States Circuit Courts *shall have jurisdiction* of *all* controversies at law and in equity between trustees as such and adverse claimants x x x in the same manner and to the same extent only *as though bankruptcy proceedings had not been instituted, and such controversies had been between the bankrupt and such adverse claimants.*"

More direct and unequivocal language could scarcely be employed to *confer* jurisdiction, and at the same time to prescribe in respect of citizenship and residence what should be the test of that jurisdiction. The Act says the question is to be determined as though the controversy was "between the bankrupts and such adverse claimants"; but the position of the defendant in error is that the jurisdiction of the Circuit Court,—the thing legislated upon,—is to be determined, not by the citizenship "between the bankrupt and such adverse claimants," but by the citizenship between the *trustees and each of them* and such adverse claimants.

Our position is that the Act does confer jurisdiction upon the Circuit Court, but restricts that jurisdiction to cases in which that court would have had jurisdiction if "bankruptcy proceedings had not been instituted and such controversies had been between the bankrupt and such adverse

claimants." Or, stating the proposition differently, the manifest intent and purpose of the Act was that the jurisdiction of the Federal Courts, prescribed in pursuance of the provisions of the Constitution, should neither be enlarged nor diminished by reason of the happening of bankruptcy.

This is the view taken of the Act by Judge Newman, in *Sims v. Union Assurance Society*, 129 Fed Rep., 804, where it is said:

> "The defendant is a foreign corporation, and it must be held that Sims (the bankrupt) was a resident of this district at the time the right of action accrued, and the action is maintainable here by the trustee in bankruptcy."

Before discussing further the provisions of the present Act, it may be of assistance to review the similar provisions in prior bankruptcy acts.

By the Bankruptcy Act of 1841, Section 8, it was provided:

> "That the Circuit Court within and for the district where the decree of bankruptcy is passed shall have concurrent jurisdiction with the district court of the same district of all suits at law or in equity which may and shall be brought by any assignee of the bankrupt against any person or persons claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of said bankrupt transferrable to, or vested in such assignee."

The provision in the Bankruptcy Act of 1867, as originally passed, was

> "Said Circuit Courts shall also have concurrent jurisdiction with the district courts of the same district, of all suits at law or in equity, which may or shall be brought by the assignee in bankruptcy against any person claiming an adverse interest, or by such person

against such assignee, touching any property or rights of property of said bankrupt, transferable to, or vested in such assignee."

By the Act of June 2, 1874, R. S. Sec. 4979, this was amended to read as follows:

"The several Circuit Courts shall have within each district, concurrent jurisdiction with the district court of any district, whether the powers and jurisdiction of a circuit court have been conferred on such district court or not, of all suits at law or in equity brought by an assignee in bankruptcy against any person claiming an adverse interest or owing any debt to such bankrupt, or by any such person against an assignee, touching any property or rights of the bankrupt, transferable to or vested in such assignee."

Under the Act of 1867, it was held by this court in *Lathrop v. Drake*, 91 U. S., 516, that an assignee in bankruptcy could maintain a suit to recover the value of property in a circuit court of the United States in any district other than that in which the decree of bankruptcy was made, and without regard to the citizenship of the parties.

The provisions of the prior acts are reviewed, and the cases with reference to them are discussed, by Mr. Justice Gray, in *Bardes v. Bank*, 178 U. S., 524; and in discussing the construction of Section 23 of the present Bankruptcy Act, he says:

"The first clause provides that 'the United States circuit courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy' (thus clearly recognizing the essential difference between proceedings in bankruptcy, on the one hand, and suits at law or in equity, on the other), 'between trustees as such and adverse claimants, concerning the property acquired or claimed by the trustee', *restricting* that jurisdiction, however, by the further words, 'in the same manner and to the same

extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.' This clause, while relating to the circuit courts only, and not to the district courts of the United States, indicates the intention of Congress that the ascertainment, as between the trustee in bankruptcy and a stranger to the bankruptcy proceedings, of the question whether certain property claimed by the trustee does or does not form part of the estate to be administered in bankruptcy, shall not be brought within the jurisdiction of the national courts solely because the rights of the bankrupt and of his creditors have been transferred to the trustee in bankruptcy.

"But the second clause applies both to the district courts and to the circuit courts of the United States, as well as to the state courts. This appears, not only by the clear words of the title of the section, but also by the use, in this clause, of the general words, 'the courts,' as contrasted with the specific words, 'the United States circuit courts,' in the first and third clauses.

"The second clause positively directs that 'suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt whose estate is being administered by such trustee might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant.'"

He then proceeds to show in what cases under this Section the trustee may bring suits, in this language:

"Had there been no bankruptcy proceedings, the bankrupt might have brought suit in any state courts of competent jurisdiction; or, if there was a sufficient jurisdictional amount and the requisite diversity of citizenship existed, or the case arose under the Constitution, laws, or treaties of the United States, he could have brought suit in the circuit court of the United States."

In the present case, if "bankruptcy proceedings had not been instituted," the right of the Southern Car & Foundry Company to prosecute these suits in the circuit court would have been unquestionable. The language of the section is that,

> "The Circuit Court shall have jurisdiction x x x as though bankruptcy proceedings had not been instituted."

Referring again to the provisions of the Act, we observe:

(1) Section 23a relates wholly to the jurisdiction of the *Circuit Court*, and *includes* suits brought by adverse claimants against the trustees, as well as suits by trustees against adverse claimants.

(2) Section 23b relates only to suits brought *by* trustees, but includes *all* courts.

It will therefore be observed that as to suits brought or removed into Circuit Court *by* adverse claimants, that court has jurisdiction "in the same manner and to the same extent" as though bankruptcy proceedings had not been instituted. No one can doubt that this *confers* jurisdiction *in favor* of the adverse claimant; for without such a provision, in bringing suit against the trustees, he would have been required to show diverse citizenship between himself and the trustees, and to bring suit either in the district in which they or himself resided. Under this section, the Circuit Court has jurisdiction "as though bankruptcy proceedings had not been instituted" and the suit was brought against the bankrupt. Now, if the Act *confers* jurisdiction in favor of the adverse claimant, how can it be argued that it does not likewise confer jurisdiction against him and in favor of the trustee?

But observe again:

> "The United States Circuit Courts *shall have* jurisdiction."

The language is clear, precise and emphatic,—it is mandatory,—shall have,—and is apt to confer jurisdiction.

> "The United States Circuit Courts shall have jurisdiction of *all* controversies at law or in equity, as distinguished from proceedings in bankruptcy, *between trustees* as such and *adverse claimants* concerning the property acquired or claimed by the trustees."

Now, if the Act stopped there, would any one question that the Circuit Court had jurisdiction of all controversies embraced within the language used without regard to the *citizenship* of the parties or the *amount* involved?

But Congress evidently did not deem it advisable to give such unrestricted and sweeping jurisdiction to the Circuit Court, thereby drawing to itself a large mass of litigation which otherwise would go to the local courts; and therefore we find it proceeding to declare that the Circuit Court shall have this jurisdiction of "*all* controversies between trustees as such and adverse claimants,"

> "In the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants."

Now, the test is then, would the Circuit Court have had jurisdiction (a) if bankruptcy proceedings had not been instituted, and (b) if such controversy had been between the bankrupt and such adverse claimants.

If bankruptcy had not intervened, and these suits had been brought by the bankrupt, the jurisdiction of the Circuit Court would have been unquestionable. Does not this fulfill the requirements of the Act?

Is it not manifest then that the purpose and object of the Act was to *confer*, not upon the trustees, (because it will be observed that clause "a" applies to suits brought against, as well as to those brought by the trustee) but to *confer*

upon the *Circuit Court* precisely the same jurisdiction that it would have had if the suit were brought by the bankrupt against the adverse claimant, or by the adverse claimant against the bankrupt; in other words, the test of jurisdiction is the situation as it stood at the moment of bankruptcy, unaffected by the residence and citizenship of the person who may happen to be trustee.

This construction protects, not merely the bankrupt estate, but also the adverse claimant. If either one of them had a right to resort to the Federal Courts at the moment of bankruptcy, neither one shall be deprived of that right by the happening of bankruptcy. The creditors cannot, by means of their selection of a trustee, deprive the adverse claimant of any right which he may have had to resort to a Federal Court. This protection to the adverse claimant, it will be observed, is not covered by the provisions of clause "b," for the latter relates only to suits brought *by the* trustee.

Section 23 of the Act has been before the courts in a number of cases, and while not involving the precise question presented here, the discussion in those cases quite clearly shows the opinion of the courts to be that the construction of the section is as contended for by us.

In *Burnett v. Morris Mercantile Company*, 91 Fed., 365, where the question was as to the construction of this section, prior to the amendment of 1903, Judge Bellinger says:

> "The statute intends to keep all controversies as to the validity of conveyances like these where they would have been if the bankrupt act had not been passed."

And Judge Amidon, *In re Woodbury*, 98 Fed., 833, states one of the reasons for this:

> "Under section 45, the trustee need not be a resident or citizen of the district in which the proceeding is pending; he need not only maintain an office in the district. It would frequently occur that a majority of the creditors, especially in the case of insolvent merchants, would be residents of a district other than that

of the bankrupt. Take, for example, the states of Wisconsin, Iowa, Indiana and Michigan. It might easily happen that a majority of the creditors of a bankrupt in either of these states would consist of the wholesale dealers at Chicago; and such creditors might naturally prefer to place a trustee from their own community, with whom they were personally acquainted, in control of the bankrupt estate. If this should occur, it would be possible for such a trustee to sue any debtor of the estate from either of the states named in the district of Illinois, if he should be found there; for it is well established that, when one sues in a representative capacity, it is his own, and not the residence or citizenship of the person represented, that fixes the venue and jurisdiction of Federal courts."

It is true that the point of decision in this latter case, as well as *In re Sievers*, 91 Fed., 366; *In re Newberry*, 97 Fed., 24, and *Hall v. Kinsell*, 102 Fed., 305, was overruled by this court in *Bardes v. The Bank*, but the opinions of the court are perhaps of some weight as indicating the general concensus of opinion as to the true construction of Section 23a.

This construction of the Act is in harmony with the public policy because of which the Federal Courts exist. Their purpose and object is not only to enforce the rights of the Federal Government, but to afford, in controversies between citizens of different states, a tribunal, where the rights of the parties will be determined unaffected by the local prejudice which may exist in the local tribunals. The Constitution itself, by its language, recognizes the existence of such local prejudice and the necessity of protection therefrom so far as practicable in the administration of justice.

The public policy embodied in the Constitution requires that the Southern Car & Foundry Company shall not be required to go into the State courts of the locality in which the defendants reside to litigate its controversies with them. The Bankruptcy Act therefore, should, if possible, be so

construed as to promote this public policy, and to preserve, not only to the bankrupt's estate, but also to the adverse claimants, precisely the same right to resort to the Federal Courts which they had before bankruptcy.

That the intention of the Act was to preserve the jurisdiction which the Circuit Courts would have had if bankruptcy had not intervened, is further emphasized by the Amendments of 1903.

Section 60-b and Section 67-e, the one relating to liens, and the other to preferences, each contains this provision:

> "And for the purpose of such recovery, any court of bankruptcy, as hereinbefore defined, and any State court *which would have had jurisdiction if bankruptcy had not intervened,* shall have concurrent jurisdiction."

So that while Section 23b prohibits the trustee from bringing a suit in any court save only where the bankrupt could have brought it, the amendments to Section 60b and 67e confer jurisdiction of the classes of cases covered by them only upon such *State* courts as would have had jurisdiction if bankruptcy had not intervened.

We submit therefore that the Circuit Court had jurisdiction of these cases, and the judgments appealed from should be reversed.

JOHN P. TILLMAN,
GEORGE D. LANCASTER,
JAMES H. BEAL,
for Plaintiffs in Error.

WILLIAMS & LANCASTER,
TILLMAN, GRUBB, BRADLEY & MORROW,
REED, SMITH, SHAW & BEAL,
of Counsel.

FILE COPY.

IN THE

Supreme Court of the United States.

Office Supreme Court U. S.
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JAMES H. McKENNEY, Clerk.

October Term, 1905.

No. 245.

THOMAS G. BUSH, THOMAS A. GILLESPIE and ORION L. HURLBUT, as Trustees in Bankruptcy of the SOUTHERN CAR & FOUNDRY COMPANY, a Bankrupt, Plaintiffs in Error,

versus

J. M. ELLIOTT, JR.

No. 246.

THOMAS G. BUSH, THOMAS A. GILLESPIE and ORION L. HURLBUT, as Trustees in Bankruptcy of the SOUTHERN CAR & FOUNDRY COMPANY, a Bankrupt, Plaintiffs in Error,

versus

ELLIOTT CAR COMPANY.

In Error to the Circuit Court of the United States for the Northern District of Alabama.

REPLY BRIEF FOR PLAINTIFFS IN ERROR.

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JAMES H. BEAL,
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Reply Brief for Plaintiffs in Error.

The original brief, filed on behalf of the plaintiffs in error, discussed the two questions raised by the specifications of error, namely:

(1) That the word *property* in Section 23a of the Bankruptcy Act of 1898 does include a suit to recover a *money* claim or demand; and,

(2) That, under said Section of the Bankruptcy Act the jurisdiction of the Circuit Court of the United States, in "all controversies at law or in equity, as distinguished from proceedings in bankruptcy, between trustees *as such* and adverse claimants," depends exclusively upon the diversity of citizenship between the *bankrupt* and the *adverse claimant*, and not upon the diversity of citizenship between the *trustees* and such adverse claimants.

On both of these questions the decision of the lower court was adverse to the contention made by plaintiff below. Since then, however, this Court in *Pirie vs. Chicago Title & Trust Company*, 182 U. S. 438, has held that *money is property* within the meaning of our present bankruptcy law; and, therefore, counsel for appellees seems to have abandoned his previous earnest insistance on this point and to have relied only on the second question presented.

We desire now to reply to this brief filed on behalf of appellees.

The insistence of counsel is:

(1) That Section 23a only means to confirm in the Circuit Courts of the United States the jurisdiction already conferred by the Judiciary Acts; and,

(2) That Section 23b means the same thing, with this addition—the consent proviso contained in that subsection.

(Brief for Appellees, p. 6).

If this construction of Section 23 is correct, it seems unfortunate (to appellants at least) that Congress should have expressed an intent so simple in language so complicated and misleading.

That part of Section 23a which fixes the jurisdiction of the Circuit Courts in controversies between trustees *as such*

and adverse claimants is this, the jurisdiction of the Circuit Courts in such matters shall be:

> "in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupt and such adverse claimants."

Now, when we come to counsel's argument (p. 8 of brief) we find that in effect he transposes these two sentences of Section 23a and, to give to that Section the coloring desired, makes it read as follows, the jurisdiction of the Circuit Court in such matters shall be:

> "as though such controversies had been between the bankrupt and such adverse claimants, but only in the manner and to the same extent as though bankruptcy proceedings had not been instituted."

By transposing in this manner the words in Section 23a, the plausible argument is made that Congress by this circumlocution in expression intended to provide that jurisdiction should remain in that Court as provided by the Judiciary Act; but, if in this we are correct, the sufficient answer to counsel's argument is that Congress did not so enact Section 23a.

The next process to which counsel subjects this same sub-section is one of elimination. It will be seen from this brief (p. 8-9) that in his argument he eliminates altogether from that sub-section the words:

> "and such controversies had been between the bankrupt and such adverse claimants,"

And by this means he makes Section 23a read:

> "The United States Circuit Courts shall have jurisdiction of all controversies....between trustees as such and adverse claimants..... in *the same manner* and to the *same extent only* as though bankruptcy proceedings had not been instituted."

Had Congress seen fit to express Section 23a in this form, then might counsel ask, as he does in his brief (p. 8),

> "What is the *manner* in which and the *extent* to which a Circuit Court of the United States would have had jurisdiction if the Southern Car & Foundry Company had been plaintiff and Elliott defendant?"

And this question counsel might have properly answered as he has answered the question presented in the case at bar:

> "The jurisdiction in that event would have been to the extent of the cases enumerated in the Judiciary Act and *none other*."

Having given, in this manner, a satisfactory construction to Section 23a, the next difficulty that presented itself was, how to dispose of Section 23b. It was apparent that Section 23a dealt only with the jurisdiction of the Circuit Court and that, too, regardless of whether the suit was brought therein by the "trustee *as such*" or by "adverse claimants"; but Section 23b, while limited in its direct application to "suits brought or prosecuted by the trustee," nevertheless had a broader application than Section 23a in this, that it controlled the jurisdiction of all courts—State and Federal—in the matter of "suits brought or prosecuted by the trustee." In this latter respect Section 23b, by its express terms and in language most simple and direct, provided that:

> "Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt.....might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, etc."

It would seem to require no high degree of discernment to conclude that, if the trustee only be permitted to bring suit in the Courts,

> "*Where the bankrupt might have brought suit* if bankrupcty had not occurred," the trustee certainly had authority to bring suit in the court "*where the bankrupt might have brought suit if bankruptcy had not occurred.*"

Therefore, in the case at bar, as the bankrupt, the Southern Car & Foundry Company, a citizen of New Jersey, might have brought this suit against Elliott, a citizen of Alabama, in the Circuit Court of the United States for the Northern District of Alabama, "if proceedings in bankruptcy had not occurred," it would seem to follow that the trustees of the bankrupt "as such" would have the same right.

The difficulty, thus suggested, counsel easily rids himself of by making his transformed product of Section 23a swallow up and consume all of Section 23b except the "consent clause" therein contained, and, in this manner, he is enabled to conclude that the practical effect of Section 23b is merely to enable any court to take jurisdiction of a suit brought by a trustee in event the proposed defendant assents thereto.

A correct analysis of counsel's brief we think will show that in-so-far as his conclusion can be said to be plausible in the light of his argument, the result is reached by two false processes: In one instance, he in effect transposes the language of Section 23a, thus making of that Section a different thing from the reality; and, in another, he eliminates from that Section the very sentence that in our judgment is determinative of the meaning intended by Congress. Having in this manner subjected Section 23a to a process of re-construction, he attempts to give meaning to Section 23b by amalgamating it with his mutilated Section 23a and, by thus urging the two into one, he is enabled to reach his conclusion—

> "The evident intent of the two sections construed together is that, at least so far as suits by trustees are concerned, no court shall acquire any jurisdiction for which a basis cannot be found under the provisions of statutes other than the Bankruptcy Act, except by the consent of the proposed defendants." (Appellees Brief p. 7)

"This contention," says counsel for appellees, "is directly supported by the opinion of Mr. Chief Justice Fuller in the case of *Spencer vs. Duplan Silk Co.*, 191 U. S. 526."

We beg to differ with counsel in this as we do in his view of Section 23.

In the Duplan Silk Company case both the bankrupt and his trustee were citizens of the same State, Pennsylvania, and citizens of a State different from that of the defendant; therefore, the question presented in the case at bar did not and could not arise.

The only question in the Duplan case was whether the judgment of the Circuit Court of Appeals was *final.* This Court held that, as the matter in controversy involved no Federal question and only a common law right, and, as the jurisdiction of the Circuit Court on removal was rested only on a diverse citizenship, the judgment of the Circuit Court of Appeals was final under the Act of 1891, just as a judgment of the Supreme Court of Pennsylvania in the same case would have been final had removal to the Circuit Court not been had.

What, then, is the true meaning of Section 23a and Section 23b?

It rarely happens that a legislative enactment is in language so plain as to escape challenge. Indeed, it seems to be a growing tendency to clothe with an air of mystery the words of statutes, and to discover therein the existence of some occult meaning radically different from that conveyed by the ordinary sense in which the words are used. This tendency is an evil which the courts frequently face and, of which some courts have complained.

In the case at bar, we ask for that construction which we gave to Section 23 at the time we brought this suit, that construction which seemed to us then, and which seems to us now, the clear intent of Congress as expressed by the natural and ordinary meaning of the words used.

In ascertaining "the effect of these two sections, considering the language of each and their relation to one another," it seems to us two things should be kept in mind:

(1) *In the first place*, it was not the intention of Congress that controversies, between trustees and adverse claimants, should be brought within the jurisdiction of the national courts solely because the trustees obtained their title as such through the medium of a Federal Statute.

Bardes vs. Bank, 178 U. S., 537.

It was not the purpose of Congress to make the Bankruptcy Act a means in itself, of enlarging the jurisdiction of the Federal Courts over such controversies. On the contrary, by limiting the right of the trustee to bring suits "in the courts only where the bankrupt might have brought them if proceedings in bankruptcy had not been instituted," such controversies were left "to be tried and determined, for the most part, in the local courts of the State, to the greater economy and convenience of litigants and witnesses."

Bardes vs. Bank, Supra. p. 538.
Shoshone Mining Co. vs. Rutter, 177 U. S. 505.

(2) *In the next place*, the Act of 1898 does not require the trustee to be a citizen of the same State as the bankrupt. The Act, after providing that one or three trustees may be elected, further provides such trustee, whether an individual or a corporation, need only "have an office in the judicial district in which they are appointed." (Secs. 44-45)

Again, the Act of 1898 gives jurisdiction to District Courts:

> "to (1) adjudge persons bankrupt who have had their principal place of business, resided, or had their domicile within their respective territorial jurisdictions for the preceding six months, or the greater portion thereof, or who do not have their principal place of business, reside or have their domicile within the United States, but have property within their jurisdiction, etc." (Sec. 2)

When, therefore, Sections 23a and 23b are read in the light of these two considerations, it seems to us difficult to escape the conclusion, that Congress, bearing in mind the possible diversity of citizenship between the bankrupt and his trustee, intended that this *possibility* should not give to any court a jurisdiction it would not have had "if bankruptcy had not occurred," and should not take away from any court a jurisdiction which it would have had "if bankruptcy had not occurred."

In other words, so far as the jurisdiction of courts should depend upon a diversity of citizenship between the parties litigant, Congress made such jurisdiction depend upon the citizenship of the bankrupt and the adverse claimant, without regard to the possibilities of the citizenship of the trustees.

Only in this way could Congress preserve for the creditors of the bankrupt all of the rights which their bankrupt had, and at the same time, preserve to the adverse claimants the right to assert their claims against the trustees *as such* "in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupt and such adverse claimants."

But let us consider Section 23a separate and apart from Section 23b.

It is conceded that Section 23a has reference solely to the jurisdiction of the United States Circuit Courts in matters of controversy "between trustees *as such* and adverse claimants, concerning the property acquired or claimed by the trustees." It is further conceded that, in the matter of such controversies, Section 23a gives to or preserves in the adverse claimant the same and identical right to the jurisdiction of the Circuit Court that it gives to or preserves in the trustees as such. Hence, it must follow that the *test* which will determine when the adverse claimant will have the right to bring suit in that Court must also determine

the like right of the trustee. What then, within the contemplation of Section 23a, is the diversity of citizenship between the parties that gives the adverse claimant the right to bring suit in the Circuit Court against trustees as such?

If "bankruptcy had not been instituted," it is conceded in the case at bar that Elliott, a citizen of Alabama, the adverse claimant, would have had the right to bring this suit in the Circuit Court against the Southern Car & Foundry Company, a citizen of New Jersey. Was that right taken away or was it preserved intact by Section 23a? That Section answers the question in these words:

> "The United States Circuit Courts shall have jurisdiction of all controversies at law and in equity..... between trustees as such and adverse claimants..... in the same manner and to the same extent only *as though proceedings in bankruptcy had not been instituted* and such controversies had been between the *bankrupt* and such adverse claimants."

Does not this Section express, as plainly as the English language can express anything, the idea that the right which the adverse claimant would have had against the bankrupt "had bankruptcy proceedings not been instituted" should be preserved in his behalf against the trustees as such?

This fact seems not only self evident from the words of Section 23a, but it is in harmony with the intent of Congress in passing the Act of 1898, as that intent is evidenced by the Act itself, the debates in Congress and the decisions of this Court.

Under Section 2 of the Bankruptcy Act of 1867 the Circuit and District Courts of the United States were given "concurrent jurisdiction of all suits at law or in equity, by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee, etc."

Concerning this Section, this Court in *Eyster vs. Gaff,* 91 U. S. 521-525, speaking by Mr. Justice Miller, said:

> "The debtor of a bankrupt, or the man who contests the right to real or personal property with him, *loses none of those rights* by the *bankruptcy of his adversary.* The same Courts remain open to him in such contests, and the Statute has not divested those Courts of jurisdiction in such actions."

In *Bardes vs. Bank,* Supra, this Court points out that, while Congress in passing the Act of 1898 did not see fit to give to the Circuit and District Courts concurrent jurisdiction over such controversies, nevertheless Congress took care to provide in unmistakable language that the adverse claimant "*loses none of those rights* by the *bankruptcy of his adversary*" by providing, in so many words, that he should not.

And the test of such jurisdiction adopted by this Court, is in substance the test prescribed by the very words of Section 23, and is thus expressed by Mr. Chief Justice Fuller:

> "Had there been no bankruptcy proceedings, the bankrupt might have brought suit in any State Court of competent jurisdiction; or, if there was a sufficient jurisdictional amount and the requisite diversity of citizenship existed or the case arose under the constitution, laws or treaties of the United States, he could have brought suit in the Circuit Court of the United States."

If in this we are correct, the effect of Section 23a is not to take away from the adverse claimant the right to avail himself of the aid of the United States Circuit Courts in asserting title to property claimed by trustees as such, if such right would have vested in such claimant against the bankrupt had "bankruptcy proceedings not been instituted."

Therefore, the rights of trustees as such and of adverse claimants under Section 23a being identical, it must follow that trustees as such have the same right.

But if Section 23a be of doubtful meaning and be susceptible of more than one construction, we submit that this doubt is eliminated and the true construction of that Section made certain by virtue of the express terms of Section 23b.

While Section 23b relates only to suits brought by trustees, it fixes the character of all the courts, both State and Federal, in which such suits shall be brought. By express terms it provides that the trustee shall only bring or prosecute suits in those courts where the bankrupt might have brought or prosecuted them "if bankruptcy proceedings had not been instituted."

Therefore, the test prescribed under this provision of the Bankruptcy Act, as to the jurisdiction of any particular court into which the trustee may bring a suit, is whether or not the bankrupt could have brought or prosecuted such a suit in that court "if proceedings in bankruptcy had not been instituted."

Taking this as a test in the case at bar, it is evident that the bankrupt, the Southern Car & Foundry Co., a New Jersey corporation, could have brought suit in the Circuit Court of the United States for the Northern District of Alabama against Elliott, a citizen of Alabama, and a resident of said District, "if proceedings in bankruptcy had not been instituted," and, therefore, it must follow that the trustees of such bankrupt must have the same right.

This, we submit, is not only the unmistakable meaning of that Section, but it is the construction given to that Section by this Court in *Bardes vs. Bank*, Supra.

While, in this last mentioned case, the question before the Court was the jurisdiction given to the District Courts of the United States by Section 23b, nevertheless, the construction therein given to that Section must apply, we think, as well to the right of the trustee to bring suit in the Circuit Court of the United States as it does apply to his right to bring suit in the District Court of the United States or in the State Court.

Many of the District Courts had held that under the provisions of Section 2 of the Act of 1898, a District Court of the United States had jurisdiction to entertain a plenary suit brought by a trustee against an adverse claimant without the consent of the proposed defendant.

This Court held that Section 2 had no application for the reason that it only referred to the jurisdiction of the District Courts in bankruptcy proceedings proper and that the jurisdiction of the District Court in the matter of independent suits between trustees and adverse claimants was controlled exclusively by the provisions of Section 23b.

Under this Section, the *test* of jurisdiction is thus stated by Mr. Chief Justice Fuller:

> "The *second clause positively directs* that 'suits by the trustee shall only be brought or prosecuted in the courts, where the bankrupt whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant.'
>
> "Had there been no bankruptcy proceedings, the bankrupt might have brought suit in any state court of competent jurisdiction or if there was a sufficient jurisdictional amount, and the requisite diversity of citizenship existed, or the case arose under the Constitution, laws or treaties of the United States, he could have brought suit in the Circuit Court of the United States. Act of August 13, 1888, c. 866; 25 Stat. 434. He could not have sued in a District Court of the United States, because such a court has no jurisdiction of suits at law or in equity between private parties, except where, by special provision of an Act of Congress, a District Court has the powers of a Circuit Court, or is given jurisdiction of a particular class of civil suits."

It is manifest, we submit, that the above test prescribed in Section 23b, as to whether or not the District Court of the United States could have jurisdiction in a suit brought

therein by a trustee against an adverse claimant, is the same test that must be made as to the jurisdiction of the Circuit Court of the United States or of a State Court if suit should be brought in such courts by the trustee.

Taking this, then, as a true construction of Section 23b, it harmonizes with the construction we have heretofore given to Section 23a, and in this manner the two sub-sections of Section 23 are kept from conflict with each other.

To sustain the construction given Section 23a and Section 23b by counsel for appellees, the views of various text writers are cited as authority. But an examination of these authorities will show that, with one exception only, they do not sustain counsel's contention. The most that can be said of them is that, in speaking of the diversity of citizenship necessary to give jurisdiction to the Circuit Courts of the United States in the matter of such controversies, it is difficult to determine whether these writers refer to the citizenship of the trustee or of the bankrupt.

In other words, the best that can be claimed of them by counsel for appellees is they are Delphic Oracles.

The one exception referred to is that of the Cyc. of Law & Procedure. It will be seen, however, that the *premise* of the author does not sustain his *conclusion;* at least, we think this appears to be true when the whole of the author's statement is considered, for it appears that counsel, in dividing the statement in question into two parts, has omitted therefrom a connecting sentence. From the citation given by the author, it is evident he is attempting to state the effect of the decision of this Court in *Bardes vs. Bank.* Beginning with the omitted sentence above referred to, the statement of the author is as follows:

> "And it is further decided that the District Courts of the United States can only entertain jurisdiction of such suits when it appears that the proposed defendant has consented thereto. *(Bardes vs. Bank).* It follows,

therefore, that where the trustee and the proposed defendant are residents of the same State, all such collateral actions must be brought in the State courts unless there is consent to the jurisdiction of the United States Circuit or District Courts."

(5 Cyc. 250-251.)

If we understand correctly the decision of this Court in *Bardes vs. Bank*, the reason why the District Court is without jurisdiction in such controversies between trustees as such and adverse claimants, is because the bankrupt himself could not have brought suit in that Court "if proceedings in bankruptcy had not been instituted."

So that, not only does the *premise* fail to sustain the author's *conclusion*, but the reason of this Court's holding in *Bardes vs. Bank* has altogether escaped the author's attention.

To the contrary, *Loveland on Bankruptcy*, (Second Edition) p. 105, says, concerning Section 23a:

"THE STATUS OF THE BANKRUPT DETERMINES JURISDICTION.

"The Circuit Courts have jurisdiction only in the same manner and to the same extent as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupt and the adverse claimants. This clause is a limitation upon the exercise of the jurisdiction of the Circuit Courts.

"The judiciary act of 1887, as amended August 13, 1888, conferred jurisdiction upon the Circuit Courts in 'cases arising under the Constitution and laws of the United States.' It is well settled that where the plaintiff holds an office like that of a receiver appointed by the court, or a receiver of a national bank, that the suit involves a federal question, and may be prosecuted in the Circuit Courts without regard to the citizenship of the parties. This rule was applied under the Act of 1867 with reference to assignees. A trustee, being an

officer of the court under the present act, would have undoubtedly been entitled to have prosecuted suits in the Circuit Courts on this ground, were it not for the restriction contained in Section 23a. As it is, however, in order that the Circuit Courts may take cognizance of the controversy, there must exist a *diversity of citizenship*, as *between* the *bankrupt* and the *adverse claimants*, and the amount involved must exceed two thousand dollars. *The citizenship of the trustee is immaterial.* The averments of the first pleading must show that all these jurisdictional requisites exist."

We are not without reason to believe that the above statement, found in the last edition of Mr. Loveland's very able work, was written with full knowledge of the decision of the lower court in the case at bar and after a careful review of the question in the light of the holding of the lower court in this case.

And this view of Mr. Loveland we find is the view taken of Section 23a in every reported opinion of the District Judges we have been able to find. While prior to the decision of this Court in *Bardes vs. Bank* there was much difference in opinion among the District Judges as to the jurisdiction of the District Courts in controversies between trustees as such and adverse claimants, owing to the confusion produced by some of the sub-sections of Section 2 of the Bankruptcy Act, it will be seen that in reference to the jurisdiction of the Circuit Courts all of the reported opinions are in accord, that in-so-far as the jurisdiction of that Court was dependent upon a diversity of citizenship between the parties it rested upon the citizenship of the bankrupt and not of his trustee as such.

In the case at bar, the Southern Car & Foundry Company had at the time of the bankruptcy, a claim against J. M. Elliott, of Alabama, in the sum of $150,000.00. Under the laws of the United States, the Southern Car & Foundry Company had the right to invoke the jurisdiction of the Circuit Court of the United States for the Northern District of Alabama to determine this claim to the end that a fair trial

might be had, free from the influence of the partiality that might exist in favor of Elliott among his neighbors in the little community of Gadsden where he lived. This right was a thing of value to the Southern Car & Foundry Company. Did that right vest unimpaired in the trustees as such for the benefit of the creditors or was it taken away by the Bankruptcy Act?

We submit that under the Act of 1898 the trustees in this case have the same right to sue in the Circuit Courts that the bankrupt would have had "if procedings in bankruptcy had not been instituted," and that, under this construction, the present Bankruptcy Act is made to take from Elliott no right and to take from the creditors of the bankrupt no right, but to preserve the rights of both as such rights would have been *"if proceedings in bankruptcy had not been instituted."*

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FILE COPY.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

Office Supreme Court U. S.
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JAMES H. MCKENNEY,
Clerk.

No. 245.

THOMAS G. BUSH, THOMAS A. GILLESPIE, AND ORION L. HURLBUT, AS TRUSTEES IN BANKRUPTCY OF THE SOUTHERN CAR AND FOUNDRY COMPANY, A BANKRUPT, PLAINTIFFS IN ERROR,

versus

J. M. ELLIOTT, JR.

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versus

ELLIOTT CAR COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ALABAMA.

BRIEF AND ARGUMENT FOR APPELLEES.

AMOS E. GOODHUE,
For Appellees.

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(19,733 and 19,734.)

SUPREME COURT OF THE UNITED STATES.

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ELLIOTT CAR COMPANY.

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BRIEF AND ARGUMENT ON BEHALF OF APPELLEES.

As the two cases above entitled present for the consideration of the court the same question, it has been agreed between counsel representing appellants and counsel represent-

ing appellees that both cases be submitted together on a single brief.

The facts are as follows: The Southern Car and Foundry Company was a body corporate and a citizen of the State of New Jersey. This corporation was adjudged a bankrupt. Thomas G. Bush, Thomas A. Gillespie, and Orion L. Hurlbut were appointed trustees in bankruptcy of the said Southern Car and Foundry Company. J. M. Elliott, Jr., was a citizen of the State of Alabama. The Elliott Car Company was likewise a citizen of Alabama. The said trustees in bankruptcy brought, in the circuit court of the United States for the northern district of Alabama, two separate actions, one against J. M. Elliott, Jr., and the other against the Elliott Car Company. The allegations in each case, on which jurisdiction was claimed, were substantially the same.

In the case against J. M. Elliott, Jr., the allegations were as follows:

> "Thomas G. Bush, Thomas A. Gillespie, and Orion L. Hurlbut, as Trustees in Bankruptcy of the Southern Car and Foundry Company, a Body Corporate Organized under the Laws of the State of New Jersey and a Citizen of said State, a Bankrupt, Duly Adjudicated by the District Court of the United States Having Jurisdiction of said Bankrupt, and Who Were Duly Appointed Such Trustees by said Court, Plaintiffs,
>
> *vs.*
>
> J. M. Elliott, Jr., Who is a Citizen of the State of Alabama, Defendant.
>
> "The said plaintiffs, as trustees in bankruptcy of the Southern Car and Foundry Company, a bankrupt, as aforesaid, the said Southern Car and Foundry Company being a corporation organized and existing under the laws of New Jersey and a citizen of said State, claim of the said defendant, a citizen of the State of Alabama, the sum of one hundred and fifty thousand dollars for money paid by the said Southern Car and Foundry Company prior to said adjudication

in bankruptcy, to wit, on the 17th day of January, 1901, at his request, which sum of money, with the interest thereon, is still due and unpaid, and is the property of said plaintiffs as trustees as aforesaid. * * * And the said plaintiffs aver, as a part of each and every one of the foregoing counts, that the said Southern Car and Foundry Company is a body corporate organized and existing under the laws of the State of New Jersey and a citizen of said State, and was duly adjudicated a bankrupt in and by a district court of the United States having jurisdiction to make such adjudication, and the said plaintiffs were thereafter duly appointed trustees in bankruptcy of the said Southern Car and Foundry Company and have duly qualified as such, and that the said defendant is a citizen of the State of Alabama."

Thereafter appellee in each case moved the court to dismiss the case for want of jurisdiction. This motion the court below sustained.

The vital question in this case is: Had the circuit court of the United States for the northern district of Alabama jurisdiction of these cases?

It will be observed that the citizenship of the trustees is not averred or made in any way to appear in either of the complaints. It is manifest, therefore, that jurisdiction of the circuit court cannot rest upon diversity of citizenship under the judiciary act.

Coal Company *vs.* Blatchford, 11 Wall., 172.

Appellants are therefore forced to rely upon section 23 of the bankrupt act to support the jurisdiction claimed. Section 23 reads as follows:

"23. *Jurisdiction of United States and State Courts.—a.* The United States circuit courts shall have jurisdiction of all controversies at law and in equity as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the

trustees, *in the same manner and to the same extent only* as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupt and such adverse claimants.

"*b.* Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, except suits for the recovery of property under section sixty, subdivision (*b*), and section sixty-seven, subdivision (*e*)."

The contention on the part of appellants' counsel is that this section confers jurisdiction upon the United States circuit courts of all controversies at law and in equity between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees in which there appears diverse citizenship as between the bankrupt and the adverse claimant, regardless of the fact that no such diverse citizenship is made to appear as between the trustee and the adverse claimant. Our contention, on the contrary, is that section 23 declares that the jurisdiction of the circuit courts of the United States shall extend to no case of the class named in which these courts had not jurisdiction under existing provisions of law.

We insist that the real meaning of subsection (*a*) is that, regardless of whether the trustees in bankruptcy or adverse claimants are plaintiffs, in all controversies at law and in equity between trustees in bankruptcy and adverse claimants concerning the property acquired or claimed by the trustees, the only jurisdiction that shall be exercised by the United States circuit courts is such jurisdiction as is conferred by statutes other than the bankrupt act; and subsection (*b*) is intended to declare that when the suit is brought by the trustee neither the circuit nor the district courts of the United States shall have any jurisdiction except such jurisdiction as already existed under provisions of law other than the

bankrupt act, unless the defendant consents that such jurisdiction be exercised. If subsection (*a*) had stood alone, it could have been asserted with great force that while the jurisdiction of the circuit court had been limited to cases in which the jurisdiction could be based on the judiciary act, yet the jurisdiction of the district court remained as it was under former bankrupt acts; and it might have also been contended with great force that, as the judiciary act itself provides that the circuit courts take jurisdiction of cases which arise under the Constitution or laws of the United States, therefore, under subsection (*a*), circuit courts of the United States would have jurisdiction of suits by a trustee in bankruptcy to recover the assets of the bankrupt estate. Hence the necessity of subsection (*b*), which prevents any such construction, and, aiding subsection (*a*), declares that when the trustee is plaintiff, not only the circuit court, but the district court as well, and all other courts must base their jurisdiction upon the statutes applicable to ordinary cases. The evident intent of the two sections construed together is that, at least so far as suits by trustees are concerned, no court shall acquire any jurisdiction for which a basis cannot be found under the provisions of statutes other than the bankrupt act except by the consent of the proposed defendant. In other words, these sections mean that when the courts come to determine whether or not they have jurisdiction of any given case they should test that jurisdiction by the application of the same rules that govern in ordinary cases.

In referring to subsection (*a*) this court said, in Bardes *vs.* Hawarden, 178 U. S., 537:

> "This clause, while relating to the circuit courts only, and not to the district courts of the United States, indicates the intention of Congress that the ascertainment, as between the trustee in bankruptcy and a stranger to the bankruptcy proceedings, of the question whether certain property claimed by the trustees does or does not form part of the estate to be

> administered in bankruptcy, shall not be brought within the jurisdiction of the national courts, solely because the rights of the bankrupt and of his creditors have been transferred to the trustee in bankruptcy."

And again, in referring to subsection (*b*), this court says in the case above cited:

> "One object in inserting this clause in the act may well have been to leave such controversies to be tried and determined, for the most part, in the local courts of the State, to the greater economy and convenience of litigants and witnesses."

A careful analysis of the language of section 23, subsection (*a*), will show that the construction suggested above is the proper one. It does not declare that the United States circuit courts shall have jurisdiction of all controversies at law and in equity between trustees as such and adverse claimants concerning the property acquired or claimed by the trustee in all cases in which it would have had jurisdiction if the controversy had been between the bankrupt and such adverse claimants, regardless of the fact that there may be no diverse citizenship as between the trustee and the adverse claimant, but it declares that the jurisdiction shall be had in the *same manner and to the same extent only* as though the controversy had been between the bankrupt and such adverse claimant. When the controversy is between the bankrupt and an adverse claimant in the United States circuit court, that court has jurisdiction *in the manner* provided by the judiciary act and the ordinary rules of procedure. The expression "*in the same manner*" therefore prevents the exercise of any summary jurisdiction by the United States circuit court or the exercise of any jurisdiction by the court in any manner other and different from the ordinary jurisdiction.

Then the act proceeds:

> "To the same extent only as though bankruptcy proceedings had not been instituted and such con-

troversies had been between the bankrupt and such adverse claimant."

What is the *manner* in which and the *extent* to which a circuit court of the United States would have had jurisdiction if the Southern Car and Foundry Company had been plaintiff and Elliott defendant? The jurisdiction, in that event, would have been to the *extent* of the cases enumerated in the judiciary act and *none other*. So when the trustee sues or any controversy arises of the class named in subsection (*a*) the jurisdiction extends to the cases enumerated in the judiciary act and *none other*. The test is not, Could the bankrupt have brought the suit in the circuit court of the United States? The test is, Would the jurisdiction of the circuit court be sustained in a suit brought by the bankrupt containing the *same jurisdictional allegations?* The intention is not to provide that the trustee may sue in any court in which the bankrupt might have sued, but that the jurisdiction of the court in both cases shall be had in the *same manner* and to the *same extent*. The intention is to provide that the test of jurisdiction in any given suit of the class named in section 23 shall be the same test of jurisdiction that would have been applied if the suit had been between the bankrupt and the adverse claimant. It was not the intention to provide that the mere fact that the court would have had jurisdiction in the one case draws to it jurisdiction in the other, regardless of the fact that the test applied shows jurisdiction in the one case and fails to show it in the other.

Suppose this controversy had arisen between the Southern Car and Foundry Company, bankrupt, and Elliott. In determining the jurisdiction the test would have been, Does the complaint affirmatively show diverse citizenship between the parties to the suit? The jurisdiction of the United States circuit court would "extend" to this controversy if the complaint affirmatively showed this diverse citizenship. The jurisdiction of the United States circuit court would not ex-

tend to this controversy unless the complaint did show diverse citizenship or some other basis for the exercise of jurisdiction to be found elsewhere than in the bankrupt act. The plain intent of subsection (*a*) is that the jurisdiction of the United States circuit court of such controversies shall extend only to cases provided for by the judiciary act and other legislation than the bankrupt act. When such a case arises in the United States circuit court, the jurisdiction can never depend upon the bankrupt act.

We insist that this contention is directly supported by the opinion of Chief Justice Fuller in the case of Spencer *vs.* Duplan Silk Company, 191 U. S., 526.

In this case Spencer, the plaintiff, was the trustee in bankruptcy of Bennett & Rothrock, bankrupts. Both Spencer and Bennett & Rothrock were citizens of Pennsylvania. The defendant, Duplan Silk Company, was a citizen of New York. The original action was commenced by Spencer in a State court. The case was removed to the United States circuit court by the defendant, and resulted in a judgment for plaintiff in that court. A writ of error was prosecuted to the circuit court of appeals. The circuit court of appeals reversed the judgment of the circuit court and remanded the cause, with instructions to enter judgment for defendant. The plaintiff, trustee in bankruptcy, obtained a writ of error to the Supreme Court of the United States. Section 6 of the judiciary act of March 3, 1891, provides in substance that the judgments rendered by the circuit court of appeals are final in all cases in which the jurisdiction of the circuit court is dependent entirely upon the parties being aliens and citizens of the United States or citizens of different States, and in all other civil actions, if the matter in controversy exceeds one thousand dollars besides costs, there is, as of right, an appeal or writ of error to bring the case to the Supreme Court of the United States. If the jurisdiction of the circuit court in the case of Spencer *vs.* Duplan Silk Company could have been maintained by reason of the fact that the bankrupts

were citizens of the State of Pennsylvania, regardless of the citizenship of the plaintiff, trustee in bankruptcy, it would follow necessarily that the jurisdiction of the circuit court was not dependent entirely upon the parties being citizens of different States. But this court held that the jurisdiction was dependent *entirely* upon the parties being citizens of different States, and for that reason dismissed the writ of error. In other words, a careful analysis of the opinion of Chief Justice Fuller in the case of Spencer *vs.* Duplan Silk Company shows that this court has construed section 23 to mean that in the circuit courts of the United States the jurisdiction of all controversies between trustees and adverse claimants concerning the property acquired or claimed by the trustee arises from and is wholly dependent upon the provisions of the judiciary act. If the jurisdiction of the United States circuit court of any given controversy at law or in equity between trustees as such and adverse claimants concerning the property acquired or claimed by the trustee is to be regarded as *conferred* upon the circuit court by section 23 (*a*) of the bankrupt act, then it follows necessarily that jurisdiction in the case of Spencer *vs.* Duplan Silk Company was not dependent entirely upon the fact that Spencer, the trustee, and the Duplan Silk Company were citizens of different States, and the decision of this court in that case was wrong.

The contention made here by appellants' counsel cannot be reconciled with the opinion of this court in the case of Spencer *vs.* Duplan Silk Company.

The proposition for which we contend is well stated in the Cyc. of Law and Procedure, 5th vol., page 249:

> "The jurisdiction conferred by the section includes controversies at law as distinguished from bankruptcy proceedings. Such jurisdiction must be construed in connection with other provisions of the Federal statutes conferring jurisdiction upon such court. It was not intended to either limit or extend such jurisdiction."

And again the same author, on page 251 of the same volume, clearly states the rule as follows:

> "It follows therefore that where the trustee and the proposed defendant are residents of the same State, all such collateral actions must be brought in the State courts, unless there is consent to the jurisdiction of the United States circuit or district courts."

A clear statement of this proposition will be found also in the fourth edition of Collier on Bankruptcy, page 247, where the learned author, writing of the jurisdiction of the circuit courts, says:

> "*The Same as Fixed by General Law.*—The meaning and purpose of this subsection was clouded for some time by the struggle of many courts so to read it into the succeeding subsection as to limit and control the meaning of the latter. But the words speak for themselves. If diverse citizenship in a controversy where the amount in dispute exceeds two thousand dollars arises between the trustee and an adverse claimant, concerning property acquired or claimed by the trustee, an appropriate suit, either in law or in equity, can be laid in the circuit court, but not otherwise. Thus, in that court, the trustee may be either plaintiff or defendant; while like the adverse claimant, he has the option of proceeding in the State court, or, if the requisite diversity of citizenship and amount in controversy exists, in the circuit court. Conversely, the trustee only can sue in the district court, but only to recover property or to annul liens; and suits there need not show diversity of citizenship and two thousand dollars in dispute. Thus, the jurisdiction of the circuit court is much more limited than it was under the former law; that of the district court limited, it is true, but not to so marked an extent as is that of the other court."

The American and English Enc. of Law, vol. 16, page 755, lays down the same rule in the following language:

> "The circuit courts have jurisdiction of actions at law and suits in equity to recover debts due the bank-

> rupt or to establish the title of the estate to property claimed by third persons in any case where the facts requisite generally to the jurisdiction of such courts exist, except so far as that jurisdiction is limited by the bankrupt law."

Foster's Federal Practice, third edition, page 1151, says:

> "The circuit courts of the United States have no jurisdiction in bankruptcy. They 'have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning property acquired or claimed by the trustees in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.' That is to say, they take jurisdiction of such cases either originally or upon removal, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and which arise under the Constitution or laws of the United States, or treaties made under their authority, or in which controversy the United States are plaintiffs or petitioners, or in which there is a controversy between citizens of different States, or a controversy between citizens of a State and foreign States, citizens or subjects, or, irrespective of the value of the matter in dispute, where there is a controversy between citizens of the same State claiming lands under grants of different States."

Brandenburg on Bankruptcy, third edition, section 580, page 373, in referring to the case of Bardes *vs.* Hawarden Bank, says:

> "This decision of the Supreme Court determined that the district court of bankruptcy had no jurisdiction of any suits at law or in equity independent of the proceedings in bankruptcy as such; but that all such suits should be brought in the proper court, which is ordinarily a State court, unless the jurisdictional requirements exist outside of the bankrupt law for suing in a Federal court."

In construing legislation of the same nature as the section now under consideration this court has often recognized the intention of Congress to restrict the jurisdiction of the circuit courts.

> Cochran *vs.* Montgomery County, 199 U. S., 260.
> *In re* Pennsylvania Co., 187 U. S., 451.
> Tennessee *vs.* Union and Planters' Bank, 152 U. S., 454.

Our insistence in this case is in line with the sugestion of Mr. Justice Miller in Smith *vs.* Lyon, 133 U. S., 120:

> "It is not readily to be conceived that the Congress of the United States, in a statute mainly designed for the purpose of restricting the jurisdiction of the circuit courts of the United States * * * intended that language should be given a construction which would enlarge jurisdiction of those courts.

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For Appellees.

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Of Counsel.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 245.

THOMAS G. BUSH, THOMAS A. GILLESPIE, AND ORION L. HURLBUT, AS TRUSTEES IN BANKRUPTCY OF THE SOUTHERN CAR AND FOUNDRY COMPANY, A BANKRUPT, PLAINTIFFS IN ERROR,

versus

J. M. ELLIOTT, JR.

No. 246.

THOMAS G. BUSH, THOMAS A. GILLESPIE, AND ORION L. HURLBUT, AS TRUSTEES IN BANKRUPTCY OF THE SOUTHERN CAR AND FOUNDRY COMPANY, A BANKRUPT, PLAINTIFFS IN ERROR,

versus

ELLIOTT CAR COMPANY.

RELPY BRIEF FOR DEFENDANTS IN ERROR.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 21375

(19,733 and 19,734.)

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versus

ELLIOTT CAR COMPANY.

REPLY BRIEF ON BEHALF OF DEFENDANTS IN ERROR.

The purpose of this short brief is simply to make some suggestions as to questions propounded during the oral argument of the case.

If the construction contended for by opposing counsel be placed upon section 23 of the bankrupt act, then the following consequences will follow:

Suppose the Southern Car and Foundry Company had been an Alabama corporation, and Elliott a citizen of Alabama, and the trustees had all been citizens of New Jersey. Then, if the construction of appellant's counsel be correct, Elliott could not bring a suit against the trustees in the circuit court of the United States in New Jersey.

Nor could the trustees remove to the circuit court of the United States suits that Elliott might bring against them in the State courts either of New Jersey or of Alabama. If the construction contended for by appellant's counsel be correct, then it would follow that if Elliott failed to get service in the local courts of Alabama he would be forced to bring suit in the local courts of New Jersey against the trustees to assert his claim to property adversely claimed by the trustees.

Again, the question is asked, If the construction insisted on by appellees be given to subsection *a*, why was subsection *b* added thereto? In addition to the suggestions made in original brief, we desire to add that it may well be that Congress had it in mind to prevent the CREATION of jurisdiction in the Federal courts of actions brought by the trustees by the selection of a trustee with citizenship different from the citizenship of the bankrupt. If this construction be given to subsection *b*, it would apply to a state of facts like the following:

Suppose the Southern Car and Foundry Company, bankrupt, had been a citizen of Alabama and the trustees had all been citizens of New Jersey. In that event subsection *b* would prevent the trustees, so far as suits brought by them are concerned, from taking advantage of the jurisdiction that would otherwise arise out of diverse citizenship as between themselves and Elliott. In other words, subsection *b* may well be held to provide that in actions by trustees, where the jurisdiction is based on diverse citizenship, the complaint must show diverse citizenship as between the trustee and the proposed defendant in order to support juris-

diction under the judiciary act, and also diverse citizenship as between the bankrupt and the trustee, to prevent the defeating of that jurisdiction under the limitation provided by subsection *b* of section 23 of the bankrupt act.

If the construction suggested above be given subsection *b*, it would be in harmony with the construction given that part of the judiciary act which is as follows: "Nor shall any circuit or district court have cognizance of any suit except upon foreign bills of exchange to recover the contents of any promissory note or other chose in action, in favor of any assignee or of any subsequent holder, if such instrument be payable to bearer, and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents, if no assignment or transfer had been made."

In construing this section of the judiciary act it has been uniformly held that, where the suit has been brought by the assignee of the chose in action, the complaint must show diverse citizenship as between the transferee, plaintiff in the suit, and the defendant to support the jurisdiction under the general provisions of the judiciary act with regard to diverse citizenship of the parties to the suit, and must also show diverse citizenship as between the transferrer and the defendant in order to prevent the defeating of that jurisdiction by the additional limitation provided in the particular clause of the act above referred to.

The old cases of Brown *vs.* Strode, 5 Cranch, 303, and McNutt *vs.* Bland, 2 Howard, 10, can have no application to the case at bar under the principles announced by this court in Coal Company *vs.* Blatchford, 11 Wall., 177, where Justice Field, in referring to Brown *vs.* Strode and McNutt *vs.* Bland, says: "There is no analogy between these cases and the case at bar. The nominal plaintiffs in those cases were not trustees, and held nothing for the use or benefit of the real parties in interest. They could not, as is said in McNutt *vs.* Bland, prevent the institution or prosecution of the actions or exercise any control over them. The justices of the peace

in the one case, and the governor in the other, were the mere conduits through whom the law afforded a remedy to the parties aggrieved. In the case at bar, the plaintiffs are real prosecutors of the suit * * * so long as they do not refuse to discharge the trusts reposed in them other parties are not authorized to institute or prosecute any proceedings for the enforcement of the mortgage or to exercise any control over them."

So in the case now before the court the trustees in bankruptcy control the institution of the present suit, and can in no sense be said to be merely nominal parties, whose names are used by others and who can be disregarded as parties to the suit under the principle announced in Brown *vs.* Strode, "that where the real and only controversy is between citizens of different States or an alien or citizen and the plaintiff is by some positive law compelled to use the name of a public officer who has not or ever had any interest in or control over, the courts of the United States will not consider any others as parties to the suit than the persons between whom the litigation before them exists." It was suggested during the argument that the rules laid down in Bardes *vs.* Hawarden Bank had been modified by subsequent decisions of this court. An examination of the case of Jaquith *vs.* Rocoley, 188 U. S., 623, will show that, so far as the principles laid down in the Bardes case are applicable to a case like the one at bar, viz., an action by trustees in bankruptcy against an "adverse claimant," the decision of Bardes *vs.* Hawarden Bank has not been touched or limited.

Respectfully submitted.

AMOS E. GOODHUE,
Counsel for Defendants in Error.

Supreme Court of the United States.

Nos. 245 and 246.—October Term, 1905.

Thomas G. Bush, Thomas A. Gillispie, and Orion L. Hurlbut, as Trustees in Bankruptcy of The Southern Car and Foundry Company, a Bankrupt, Plaintiffs in Error, 245 *vs.* J. M. Elliott, Jr.	In error to the Circuit Court of the United States for the Northern District of Alabama.
Thomas G. Bush, Thomas A. Gillispie, and Orion L. Hurlbut, as Trustees in Bankruptcy of The Southern Car and Foundry Company, a Bankrupt, Plaintiffs in Error, 246 *vs.* Elliott Car Company.	

[May 21, 1906.]

Mr. Justice Day delivered the opinion of the Court.

These cases were heard together and concern the same question upon practically the same facts. They involve the jurisdiction of the Circuit Court of the United States to entertain a suit to recover upon an alleged cause of action for moneys due the bankrupt at and prior to the adjudication in bankruptcy, where one of the trustees in bankruptcy is a citizen of the same State with the defendant, and the bankrupt a citizen of another State.

The suits were brought by the plaintiffs as trustees in bankruptcy of the Southern Car and Foundry Company, a corporation organized under the laws of New Jersey and a citizen of that State, against the Elliott Car Company, a corporation and a citizen of the State of Alabama, and against J. M. Elliott, Jr., a citizen of the same State. They were to recover certain sums of money alleged to have been lent by the bankrupt, for goods sold and delivered to the defendants, and upon an account stated and for money paid for them by the bankrupt. In both cases motions to dismiss were filed upon the ground that the Circuit Court of the United States had no jurisdiction because Thomas G. Bush, one of the trustees in bankruptcy, is and was at the time of the beginning of the suit a citizen of the State of Alabama, the same State of which the defendants were citizens, and the defendants had not consented to be sued in the Circuit Court of the United

States in which the action was brought. The Circuit Court held that it had no jurisdiction and dismissed the suit.

The correctness of the decision of the court below depends upon the construction of section 23 of the Bankruptcy Act of 1898. This section, entitled "Jurisdiction of the United States and State Courts," prior to the amendment of February 5, 1903, read as follows: "*a.* The United States Circuit Courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants. *b.* Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant." By the amendment of February 5, 1903, the following words were added to clause *b:* "except suits for the recovery of property under section sixty, subdivision *b*, and section sixty-seven, subdivision *e*." The excepted suits, for the recovery of property, covered by the amendment of 1903, pertain to actions to recover property conveyed by the bankrupt in fraud of the act, and do not concern actions of the character of those now under consideration.

Both sides cite and rely upon the case of *Bardes* v. *Hawarden Bank*, (178 U. S. 524,) in which case it was held that a District Court of the United States had no jurisdiction of an action brought by the trustee to set aside an alleged fraudulent transfer made by the bankrupt within four months before the proceedings in bankruptcy. That case pertained to an action to set aside a fraudulent conveyance of property which had not come into the control of the bankruptcy court. In later cases it has been held that the decision did not extend to cases wherein the bankrupt court had acquired jurisdiction over the subject-matter of the property as that of the bankrupt, as to which the bankrupt courts have been held to have jurisdiction under the power conferred in subdivision seven, section two, of the act. (*White* v. *Schloerb*, 178 U. S. 542; *Bryan* v. *Bernheimer*, 181 U. S. 188, in which case the opinion was given by Mr. Justice Gray, who also delivered the opinion in the Bardes case, and *Whitney* v. *Wenman*, 198 U. S. 539.)

While the Bardes case involved only the jurisdiction of the District Court, we think the principles announced in the opinion of Mr. Justice Gray in that case, when applied to the one now under consideration, are decisive in favor of the jurisdiction of the Circuit Court to entertain these suits. The elaborate consideration of the history of section 23 of the

present Bankruptcy Act, given in the Bardes case, renders it unnecessary to do more than epitomize from the opinion so much thereof as is necessary to an understanding of the question now made as to the jurisdiction of the Circuit Court.

The Bankruptcy Act of 1898, in respect to the matters now under consideration, was a radical departure from the act of 1867, in the evident purpose of Congress to limit the jurisdiction of the United States courts in respect to controversies which did not come simply within the jurisdiction of the Federal courts as bankruptcy courts, and to preserve, to a greater extent than the former act, the jurisdiction of the State courts over actions which were not distinctly matters and proceedings in bankruptcy. Under the act of 1867 the jurisdiction of District and Circuit Courts of the United States was concurrent with the State courts of suits in law or in equity brought by or against the assignee in reference to property of the bankrupt or to claims alleged to be due from or to him. (*Lathrop* v. *Drake*, 91 U. S. 516; *Bardes* v. *Hawarden Bank*, 178 U. S. 531, 532.) The intention of Congress to prevent actions not strictly proceedings in bankruptcy from coming within the jurisdiction of the United States courts, except in certain cases, was enacted into law in the section of the statute now under consideration. Of clause *a*, Mr. Justice Gray, speaking for the court in the Bardes case, said:

"The first clause provides that 'the United States Circuit Courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy,' (thus clearly recognizing the essential difference between proceedings in bankruptcy, on the one hand, and suits at law or in equity on the other,) 'between trustees as such and adverse claimants, concerning the property acquired or claimed by the trustees,' restricting jurisdiction, however, by the further words, 'in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupt and such adverse claimants.' This clause, while relating to the Circuit Courts only, and not to the District Courts of the United States, indicates the intention of Congress that the ascertainment, as between the trustee in bankruptcy and a stranger to the bankruptcy proceedings, of the question whether certain property claimed by the trustee does or does not form part of the estate to be administered in bankruptcy, shall not be brought within the jurisdiction of the national courts solely because the rights of the bankrupt and of his creditors have been transferred to the trustee in bankruptcy."

Clause *a* thus construed gives jurisdiction to such a controversy as the present one, for the jurisdiction is not attempted to be enlarged because of a title in the trustee derived under the bankruptcy proceedings, which it was the purpose of this clause to prevent. (Loveland on Bankruptcy, 2d ed. 105.)

The suit concerns the right to recover a money debt which is property, (*Pirie* v. *Chicago Title and Trust Co.*, 182 U. S. 438,) and, in the sense of

the law, is with an adverse claimant "concerning property acquired or claimed by the trustee," and is a controversy of which the Circuit Court had jurisdiction, as between the bankrupt and the claimant, but for the bankruptcy proceedings.

The Act of 1841 (sec. 8) gave the Circuit Court concurrent jurisdiction with the District Court of suits at law and in equity "which may and shall be brought by the assignee against any person or persons claiming an adverse interest, or by such persons against such assignees touching any property or rights of property of the bankrupt, transferable to or vested in such assignee." It was held that the Circuit Court had jurisdiction to recover a debt due the bankrupt at the suit of the assignee, and that the debtor was a party claiming an adverse interest within the sense of the act. (*Mitchell* v. *Great Works Milling Company*, 2 Story, 648; *Pritchard* v. *Chandler*, 2 Curtis, 488.) While the phraseology of the present act is somewhat different, its provisions come to practically the same thing in this respect.

Of clause *b*, in the Bardes case, it was said:

"But the second clause applied both to the District Courts and to the Circuit Courts of the United States, as well as to the State courts. This appears, not only by the clear words of the title of the section, but also by the use, in this clause, of the general words 'the courts,' as contrasted with the specific words 'the United States Circuit Courts,' in the first and in the third clauses.

"The second clause positively directs that 'suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant.'

"Had there been no bankruptcy proceedings, the bankrupt might have brought suit in any State court of competent jurisdiction; or, if there was a sufficient jurisdictional amount, and the requisite diversity of citizenship existed, or the case arose under the Constitution, laws, or treaties of the United States, he could have brought suit in the Circuit Court of the United States. (Act of August 13, 1888, c. 866; 25 Stat. 434.) He could not have sued in a District Court of the United States, because such a court has no jurisdiction of suits at law or in equity between private parties, except where, by special provision of an act of Congress, a District Court has the powers of a Circuit Court, or is given jurisdiction of a particular class of civil suits."

And after pointing out that the Bankruptcy Act of 1898 did not intend to confer the jurisdiction given under the former bankruptcy acts, the opinion continues:

"Congress, by the second clause of section 23 of the present bankrupt act, appears to this court to have clearly manifested its intention that controversies, not strictly or properly part of the proceedings in bankruptcy, but independent suits brought by the trustee in bankruptcy to assert a

title to money or property as assets of the bankrupt against strangers to those proceedings, should not come within the jurisdiction of the District Courts of the United States, 'unless by consent of the proposed defendant,' of which there is no pretence in this case."

Applying the principles thus announced, remembering that we are dealing with an action which might have been brought by the bankrupt, but for the bankruptcy proceedings, in a Circuit Court of the United States, we think it is apparent that this action comes within the provisions of section 23 of the act of 1898. The effect of clause *a*, as pointed out by Mr. Justice Gray, is to prevent the jurisdiction of the United States Circuit Court from attaching, because of the appointment of a trustee in bankruptcy. In other words, the jurisdiction of the United States courts was not to be extended, as had been done under the former acts, because of the institution of the proceedings in bankruptcy. Under clause *b* the jurisdiction of all courts is affected, and this clause pertains to suits begun by the trustee, and he is not (prior to the amendment of February 5, 1903) permitted to prosecute suits unless by the consent of the defendant, except where the bankrupt might have brought or prosecuted them if proceedings in bankruptcy had not been instituted. That is, while the jurisdiction of the courts was not to be extended because of the bankruptcy proceedings or the citizenship of the trustee, it was preserved to the trustee, in the jurisdiction where the bankrupt might have brought or prosecuted the suit but for the bankruptcy proceedings. While this section preserves the jurisdiction of the United States Circuit Courts over cases coming within clause *a*, in clause *b* the right of suit by the trustee is limited to courts wherein the bankrupt might have brought or prosecuted the action had the bankruptcy proceedings not been instituted.

The case of *Spencer* v. *Duplan Silk Company*, (191 U. S. 526,) relied upon by the counsel for defendant in error, does not militate against this construction. In that case the question was as to the right to appeal directly to this court where an action had been begun in the State court by the trustee and was removed, on the ground of diverse citizenship, to the Federal court. It was held that the jurisdiction of the Circuit Court was acquired because of diverse citizenship and not under section 23 of the bankruptcy act, and consequently the judgment was final in the Circuit Court of Appeals. The same principle was recognized in *Cochran* v. *Montgomery County*, (199 U. S. 260,) decided at this term.

The action in the present case was to recover a sum of money alleged to have been due, prior to the bankruptcy proceedings, to the Southern Car and Foundry Company, which was a citizen of the State of New Jersey. The amount involved and the diverse citizenship of the parties were such that the car company might have sued the defendant, a citizen

of the State of Alabama, in the Circuit Court of the United States independently of the bankruptcy proceedings. We think, by the terms of this section, it was intended to preserve this right to the trustee in bankruptcy, and that the citizenship of the trustee is wholly immaterial to the jurisdiction of such a case.

The Circuit Court erred in reaching the contrary conclusion, and its judgment is

Reversed.

True copy.

Test:

Clerk Supreme Court, U. S.